Supreme Court, U.S.
FILED

961651 JAN 8 1997

OFFICE OF THE CLERK

No. _____

In the
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

WCC Associates, Birtcher/BCI, *Petitioners*

v.

Hawaii Carpenters Trust Funds, *Respondent*.

On Petition for a Writ of Certiorari to the
Supreme Court of Hawaii

PETITION FOR A WRIT OF CERTIORARI

John S. Edmunds
Edmunds & Verga
841 Bishop Street, Suite 2104
Honolulu, Hawaii 96813-3945
(808) 524-2000
Counsel of Record

October 1996

69 pp

No. _____

In the
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

WCC Associates, Birtcher/BCI, *Petitioners*

v.

Hawaii Carpenters Trust Funds, *Respondent*.

On Petition for a Writ of Certiorari to the
Supreme Court of Hawaii

PETITION FOR A WRIT OF CERTIORARI

John S. Edmunds
Edmunds & Verga
841 Bishop Street, Suite 2104
Honolulu, Hawaii 96813-3945
(808) 524-2000
Counsel of Record

October 1996

QUESTION PRESENTED

Whether the Employment Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 et seq., preempts the use of a state mechanic's lien statutes to recover unpaid ERISA trust fund contributions where there is no pre-existing judgment and where liability to make those contributions is dependent on interpretation of ERISA provisions related to a collective bargaining agreement?

PARTIES TO THE PROCEEDING

Petitioner Birtcher/BCI is a Hawaii general partnership comprised of general partners Birtcher Construction Ltd. and BCI General Contractors. Yost Enterprises, Inc. aka Yost Gypsum acted as a subcontractor to Petitioner Birtcher/BCI in this case.

Petitioner WCC Associates' is a limited partnership comprised of the following:

General Partners:	WRWG, Inc. and WMAC, Inc. Officers for both WRWG, Inc. and WMAC, Inc. are: Richard W. Gushman, II; Christine Nakashima-Heise and Ronald H. W. Lum.
Limited Partners:	Richard W. Gushman, II and Duncan MacNaughton

Respondent Hawaii Carpenters Trust Funds are comprised of the following:

> Health & Welfare Trust Fund by its Trustees, Albert Hamamoto, Gilbert Ancheta, Henry Iida, Albert Belliveau, Roy Iwamoto, Elmer Cabico, Thomas T. Uyetake, Keith Hirota, Tom Jackson, and Gordon S. Higa;
>
> Apprenticeship & Training Trust Fund by its Trustees, Conrad Murashige, Sidney Shimokawa, Richmond Keliikoa, David Rosa, Wayne Kawano, Glenn Shirota,

Jim Ramirez, Mark Erwin, Toshito Isemoto, and Edward Cantere;

Vacation & Holiday Trust Fund by its Trustees, John Murchison, Harry Murakami, Murray Bawden, Mark Erwin, Gerard Sakamoto, Curtis Kern, Paul Sasaki, Keith Hirota, Allen Kusano, and James Mawae;

Pension Trust Fund by its Trustees, George J. McCarthy, Dante Agra, Pepe D'Bayan, James Maeda, Raymond Nagata, Terence Nakamura, Jiggs Tamashiro, Theodore Hackbarth, Albert Yoshiyama, and Walter H. Kupau;

Market Recovery Program by its trustees, John Murchison, Walter H. Kupau, Larry Isemoto, Melvin Fujii, Allen Kusano, Theodore Hackbarth, Conrad Murashige, Warren Chong, Thalia Choy, and Brian Kawahara;

Financial Security Trust Fund by its Trustees, Bruce Patterson, Gary Heath, Gerard Sakamoto, Walter H. Kupau, Kenneth Sakurai, Robert Moyer, Gordon Scruton, Timothy McCormack, Albert Yoshiyama, and Ralph Yackly; and

The United Brotherhood of Carpenters and Joiners of America, Local 745, AFL-CIO.

TABLE OF CONTENTS

QUESTION PRESENTED ii

PARTIES TO THE PROCEEDING iii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 2

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE PETITION 7

I. The Hawaii Supreme Court's Determination that State Mechanic's Lien Statutes Do Not Relate to ERISA Conflicts With Existing ERISA Decisions. 8

II. The Decision of the Hawaii Supreme Court Is Erroneous. 11

A. The Hawaii Supreme Court Disregarded the Breadth of ERISA's Preemption Clause. 11

B. Respondents' Reliance on ERISA Provisions in Their Applications for Mechanic's Liens Requires Preemption 15

III. The Question Presented Is Important. 16

CONCLUSION 18

TABLE OF AUTHORITIES

Cases

Aloha Airlines, Inc. v. Ahue, 12 F.3d 1498 (9th Cir. 1993) 12

Carpenters Pension Trust for No. California v. Underground Construction Co., Inc., 31 F.3d 776 (9th Cir. 1994) 5

Dillingham Construction N.A., Inc. v. County of Sonoma, 57 F.3d 712 (9th Cir. 1995), cert. granted, 116 S.Ct. 1415, 134 L.Ed.2d 541 (1996) 13

FMC Corp. v. Holliday, 498 U.S. 52, 111 S. Ct. 403, 112 L. Ed. 2d 356 (1990) 11

Fort Halifax Packing Company, Inc. v. Coyne, 482 U.S. 1, 107 S. Ct. 2211, 96 L. Ed. 2d 1 (1987). 10

Franchise Tax Board v. Construction Laborers Vacation Trust, 463 U.S. 1, 103 S. Ct. 2841, 77 L. Ed. 2d 420 (1983) 8

Gibson v. Prudential Insurance Company, 915 F.2d 414 (9th Cir. 1990) 13, 14

Hawai`i Laborers' Trust Funds v. Maui Prince Hotel, 81 Haw. 487, 918 P.2d 1143 (Haw. 1996) 2, 6, 7, 10, 17

Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 111 S. Ct. 478, 112 L. Ed. 2d 474 (1990) 12

Iron Workers Mid-South Pension Fund v. Terotechnology Corp., 891 F.2d 548 (5th Cir. 1990) 10

McCoy v. Massachusetts Institute of Technology, 950 F.2d 13 (1st Cir. 1991) 10

Metropolitan Life Ins. Co. v Taylor, 481 U.S. 58, 107 S. Ct. at 1542, 95 L. Ed. 2d 55 (1987) 9, 16

Pilot Life Insurance Company v. Dedeaux, 481 U.S. 41, 107 S. Ct. 1549, 95 L. Ed. 2d 39 (1987) 15, 16

Plumber's Local 458 Holiday Vacation Fund v. Howard Immel, Inc., 151 Wis. 2d 233, 445 N.W.2d 43 (Wis. App. 1989) 10

Pohl v. National Benefits Consultants, Inc., 956 F.2d 126 (7th Cir. 1992) 13

Seaway Port Authority v. Duluth-Superior ILA Marine Association, 920 F.2d 503,509 (8th Cir. 1990), cert. denied, 501 U.S. 1218 (1991) 6

Tingey v. Pixley-Richards West, Inc., 953 F.2d 1124 (9th Cir. 1992) 8,9

Trustees of the Electrical Workers Health and Welfare Trust v. Marjo Corporation, 988 F.2d 865 (9th Cir. 1993) 16

Turnbow v. Pacific Mutual Life Insurance Company, ... 10

Statutes and Rules

28 U.S.C. § 1257 2

28 U.S.C. § 1441 9

29 U.S.C. § 1001 ii

29 U.S.C. § 1002 7

29 U.S.C. § 1144 2

29 U.S.C. § 1145 6

29 U.S.C. § 185 15

29 U.S.C.§ 1132 . . . . . 3, 6, 9, 15, 16

Haw. Rev. Stat. § 444-9 5

Haw. Rev. Stat. § 507-42 7

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

WCC ASSOCIATES, BIRTCHER/BCI, *Petitioners,*

v.

HAWAII CARPENTERS TRUST FUNDS, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF HAWAII

WCC Associates and Birtcher/BCI respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of Hawaii in this case.

OPINIONS BELOW

Summary Disposition Order No. 96-13 issued by the Supreme Court of Hawaii (App., *infra*, 1a-3a), which vacated and remanded this case, is reported at 83 Haw. 205, 925 P.2d 375. The opinion in Hawaii Laborers' Trust Funds v. Maui Prince Hotel (App., *infra*, 6a-40a), which provides the basis for Summary Disposition Order No. 96-13 is reported at 81 Hawaii 487, 918 P.2d 1143 (Haw. 1996).

JURISDICTION

The judgments of the Supreme Court of Hawaii were entered on October 10, 1996 in Docket Nos. 18489 and 18519 pursuant to the Court's Summary Dispositional Order No. 96-13 filed therein September 10, 1996. The text of the judgments in Docket Nos. 18489 and 18519, which are identical, is included in the Appendix at pages 4a-5a. The Supreme Court of Hawaii vacated the dismissals of the trial court and remanded the matters to the trial court for further proceedings consistent with the Supreme Court of Hawaii's decision in Hawaii Laborers' Trust Funds v. Maui Prince Hotel, 81 Haw. 487, 918 P.2d 1143 (Haw. 1996).

Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

ERISA's preemption clause, 29 U.S.C. § 1144(a), provides, in pertinent part, that:

> Except as provided in subsection (b) of this section[1], the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title.

29 U.S.C. § 1144(a).

[1] Subsection (b) contains provisions governing construction an application not relevant here.

In addition, 29 U.S.C.§ 1132(e)(1) provides, in pertinent part, that:

> Except for actions under (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by ... a participant, beneficiary, or fiduciary.

29 U.S.C. § 1132(e)(1).

STATEMENT OF THE CASE

This dispute arises out of a claim by a multi-employer labor union trust fund and one of the trust fund's unions for unpaid ERISA trust fund contributions which were provided for in various collective bargaining agreements in connection with construction of a discount shopping center in Honolulu, Hawaii known as the "Waikele Power Center." Petitioner WCC Associates is the owner of the real property and improvements to the Waikele Power Center. Petitioner Birtcher/BCI aka Birtcher/BCI General Contractors ("Birtcher/BCI") was the general contractor for the Waikele Power Center. Petitioner Birtcher/BCI is a Hawaii general partnership comprised of Birtcher Construction Limited ("Birtcher") and BCI General Contractors ("BCI"). Yost Enterprises, Inc. aka Yost Gypsum ("Yost") was a subcontractor on the Waikele Power Center project obligated to make contributions to Respondent Hawaii Carpenters Trust Funds ("HCTF") pursuant to a collective bargaining agreement executed by Yost. Petitioners were not signatories to that agreement.

BCI was also a subcontractor and was required to make trust fund contributions pursuant to a collective bargaining agreement dated March 12, 1985 ("the CBA"). BCI was a signatory to the CBA, but Petitioners were not. BCI signed additional agreements with the Carpenter's Union on November 20, 1989 and August 7, 1993.

HCTF administers the pension plans for the United Brotherhood of Carpenters & Joiners of America, Local 745, AFL-CIO ("Carpenters' Union") pursuant to various trust agreements and their amendments.

Petitioner Birtcher/BCI was created by a joint venture agreement dated January 31, 1992. Birtcher provided financing

and BCI provided the license.[2] As noted above, Birtcher/BCI and Petitioner WCC Associates were not signatories to any of the above-described agreements. Due to the weakening financial condition of BCI, Birtcher and BCI agreed that Birtcher would assume management of Birtcher/BCI. Accordingly, on February 1, 1994, Birtcher Construction Ltd ("BCL") executed the Certification of Receipt and Acceptance of the Master Agreement Covering Carpenters in the State of Hawaii and Declaration of Trust Agreements Appurtenant Thereto ("the Certification"). The Certification was effective as of August 1, 1993. By this time, Birtcher had obtained a contractor's license from the State of Hawaii.

In dispute here are certain mechanics' liens which were filed when BCI did not pay trust fund contributions totalling approximately $226,000.00 for certain months in 1992 and for the first six months of 1993 (hereinafter "contributions"). Petitioner Birtcher/BCI had no obligation to make contributions due prior to August, 1993 since it did not sign either the CBA or the 1989 or 1993 collective bargaining agreements referred to above. Said Petitioner's subcontractors, BCI and Yost, signed those documents and only they, not the joint venture, were responsible for making those contributions.[3]

[2] A license is required to operate as a general engineering or building contractor in the State of Hawaii pursuant to Section 449-9 of the Hawaii Revised Statutes.

[3] It is well settled that status as a joint venture partner or parent, without more, is insufficient to support liability for contributions, and that such liability is imposed only pursuant to express contractual obligation. Carpenters Pension Trust for No. California v. Jnderground Construction

Respondents filed seven separate applications for mechanic's liens against Petitioners pursuant to Hawaii mechanic's lien statutes. In the two underlying cases which are the subject of this Petition, Respondents expressly cited ERISA's civil enforcement provision, 29 U.S.C. § 1132, in their applications for mechanic's liens. Petitioners moved to dismiss those applications based on ERISA preemption. Petitioners' motions to dismiss were granted in five of the seven mechanic's lien cases and proceedings in the other two mechanic's lien cases were stayed pending appeals to the Hawaii Supreme Court. The trial courts dismissed Respondents' applications for mechanic's liens due to ERISA preemption. Respondents appealed to the Hawaii Supreme Court.

On June 18, 1996, in an unrelated case, Hawaii Laborers' Trust Funds v. Maui Prince Hotel, 81 Haw. 487, 918 P.2d 1143 (Haw. 1996), the Hawaii Supreme Court held that ERISA did not explicitly or implicitly preempt Hawaii's mechanic's lien statutes. 81 Haw. at 498. A true and accurate copy of the Hawaii Supreme Court's opinion in Maui Prince Hotel is included in the Appendix. In Maui Prince Hotel, supra, the Hawaii Supreme Court held that Hawaii's mechanic's lien statute did not "relate to" or "purport to relate to" employee benefit plans and therefore was not preempted by ERISA. 81 Haw. at 498. The Hawaii Supreme Court concluded that the use of Hawaii's mechanic's lien statute was consistent with the intent of 29 U.S.C. § 1145 which was "to promote the prompt payment of contributions and assist plans in recovering the costs incurred in connection with delinquencies." 81 Haw. at 498-499. Here, the Hawaii Supreme Court vacated the lower court's finding of ERISA preemption based upon its ruling in

Co., Inc., 31 F.3d 776 (9th Cir. 1994); Seaway Port Authority v. Duluth-Superior ILA Marine Association, 920 F.2d 503,509 (8th Cir. 1990), cert. denied, 501 U.S. 1218 (1991).

Maui Prince, supra. In doing so, the Court ignored the fact that 29 U.S.C. § 1145 limits liability to "employers" and that Petitioner Birtcher was not an "employer" as defined by 29 U.S.C. § 1002 at the time the contributions at issue were not paid. The mechanic's lien statute, by contrast, allows an applicant to obtain a lien "upon the improvement as well as upon the interest of the owner of the improvement in the real property upon which the same is constructed." Haw. Rev. Stat. § 507-42.

Based on its ruling in Maui Prince Hotel, supra, the Hawaii Supreme Court issued an order of summary disposition in the mechanic's lien cases which are the subject of this Petition on September 10, 1996, vacating the lower courts' dismissals and remanding them for further proceedings consistent with the Maui Prince Hotel decision. On October 10, 1996, a Notice and Judgment of Appeal was filed in both Docket Nos. 18489 and 18519. Similar cases remain pending before the Hawaii Supreme Court as Docket Nos. 18161, 18280 and 18788.

REASONS FOR GRANTING THE PETITION

The Hawaii Supreme Court's decision in Maui Prince Hotel finding that ERISA is not related to state mechanic's lien statutes where those statutes are used to recover unpaid ERISA trust fund contributions conflicts with decisions from both this Court and the United States Court of Appeals for the Ninth Circuit. The risk of proliferation of state mechanic's lien actions to recover unpaid pension fund contributions normally governed by ERISA is serious in light of the Hawaii Supreme Court's decision in Maui Prince Hotel, supra. As discussed more fully below, at least one other state supreme court has ruled similarly to the Hawaii Supreme Court on this issue while three different federal circuit courts of appeal have issued decisions in apparent disagreement. This case thus presents a timely opportunity for this Court to provide needed guidance before this conflict over federal preemption multiplies further.

I. The Hawaii Supreme Court's Determination that State Mechanic's Lien Statutes Do Not Relate to ERISA Conflicts With Existing ERISA Decisions.

The Hawaii Supreme Court's holding that Hawaii's mechanic's lien statute is not related to ERISA ignores the fact that ERISA expressly addresses pension fund contribution disputes and is contrary to the Ninth Circuit's holding in Tingey v. Pixley-Richards West, Inc., 953 F.2d 1124 (9th Cir. 1992). In Tingey, the Ninth Circuit discussed ERISA preemption as follows:

> Federal interests and concerns, however, sometimes rise to a level of importance that requires an exception. To invoke it, Congress must have expressed a desire to assert authority over an area to such degree that any claim in that area is deemed federal in character. As the Court put it in *Franchise Tax [Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 103 S. Ct. 2841, 77 L. Ed. 2d 420 (1983)], these claims are "purely ... creature[s] of federal law." 463 U.S. at 23, 103 S. Ct. at 2853. They *must* be removed to federal courts and *not* remanded to state courts.
>
> Law governing employee retirement and benefit plans is

> one area in which Congress has held that complaints, even though apparently "well-pleaded," are but, as the cases put it, "artfully pleaded" federal claims disguised as state claims. In *Metropolitan Life Ins. Co. v Taylor*,[4] 481 U.S. at 64-67, 107 S. Ct. at 1546-58, the Supreme Court held that the civil enforcement provision governing claims for benefits under ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), was intended to replace similar state common law causes of action to such an extent that they are removable under 28 U.S.C. § 1441(b) as an ERISA-based cause of action.

953 F.2d at 1130 [emphasis added].

Thus, had the Hawaii Supreme Court followed the suggestion of Tingey, supra, and looked beneath the surface of the complaint, preemption should have been found. Instead, the Hawaii Supreme Court ignored the ERISA implications of Respondents' Complaint and focused merely on the fact that Hawaii's mechanic's lien statute does not expressly target ERISA plans. This is precisely the type of artful pleading disapproved of by the Ninth Circuit in Tingey, supra.

If this conflict between the Hawaii Supreme Court and the Ninth Circuit is allowed to stand, then countless others will

[4] 481 U.S. 58, 107 S. Ct. 1542, 95 L. Ed. 2d 55 (1987).

be allowed to circumvent ERISA's provisions by basing their claims on so-called neutral statutes such as Hawaii's mechanic's lien statute. Such avoidance of ERISA's provisions defeats Congress' desire to avoid a "patchwork scheme of regulation." Fort Halifax Packing Company, Inc. v. Coyne, 482 U.S. 1, 11-12, 107 S. Ct. 2211, 2217, 96 L. Ed. 2d 1 (1987).

Resolution of this conflict is not possible without a decision by this Court. Since the Hawaii Supreme Court is the court of last resort in Hawaii, only this Court can review its decisions. Turnbow v. Pacific Mutual Life Insurance Company, 934 F.2d 1100, 1103 (9th Cir. 1991). "Federal district courts, as courts of original jurisdiction, may not serve as appellate tribunals to review errors allegedly committed by state courts." Id. at 1103. This rule applies even when the state court decision involved a question of federal law. Id.

If this conflict is not resolved, other state courts are likely to follow suit in using mechanic's lien statutes as a way around ERISA preemption. For example, the Hawaii Supreme Court's decision in Maui Prince Hotel, supra, relied heavily on the Wisconsin Court of Appeals' earlier decision in Plumber's Local 458 Holiday Vacation Fund v. Howard Immel, Inc., 151 Wis. 2d 233, 445 N.W.2d 43 (Wis. App. 1989).[5] Similarly, other courts may choose to ignore the holdings of the federal courts and rely on the above decisions of the Hawaii Supreme Court and the Wisconsin Court of Appeals in order to circumvent ERISA's preemption clause.

[5] While this case remains good law in Wisconsin, both the First and Fifth Circuits have criticized this opinion and declined to follow its reasoning. See McCoy v. Massachusetts Institute of Technology, 950 F.2d 13 (1st Cir. 1991); Iron Workers Mid-South Pension Fund v. Terotechnology Corp., 891 F.2d 548 (5th Cir. 1990).

Since the issue presented here has not yet proliferated across the nation, this case presents a timely opportunity for this Court to provide guidance before a multitude of other state courts follow suit. The Court should grant certiorari to review this important conflict.

II. The Decision of the Hawaii Supreme Court Is Erroneous.

A. The Hawaii Supreme Court Disregarded the Breadth of ERISA's Preemption Clause.

This Court has noted that ERISA's preemption clause is "conspicuous for its breadth." FMC Corp. v. Holliday, 498 U.S. 52, 58, 111 S. Ct. 403, 407, 112 L. Ed. 2d 356 (1990). ERISA's preemption clause "establishes as an area of exclusive federal concern the subject of every state law that 'relate[s] to' an employee benefit plan covered by ERISA." Id.

This Court has broadly defined the phrase "relates to" as follows:

> "A law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan." Under this "broad common-sense meaning," a state law may "relate to" a benefit plan, and thereby be preempted, even if the law is not specifically designed to affect such plans, or the effect is only indirect. Preemption is also not precluded

> simply because a state law is not consistent with ERISA's substantive requirements.

Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 139, 111 S. Ct. 478, 483, 112 L. Ed. 2d 474 (1990) [citations omitted].

Further, as explained by the Ninth Circuit in Aloha Airlines, Inc. v. Ahue, 12 F.3d 1498 (9th Cir. 1993), relation to ERISA is demonstrated by regulation of relationships between employers and employees and the obligations flowing from these relationships. 12 F.3d at 1505. The Ninth Circuit elaborated by stating:

> [t]he key to distinguishing between what ERISA preempts and what it does not lies ... in recognizing that the statute comprehensively regulates certain *relationships*: for instance, the relationship between plan and plan member, between plan and employer, [and] between employee and employee(to the extent an employee benefit plan is involved).... [B]ecause state laws regulating these relationships (or the obligations flowing from these relationships) are particularly likely to interfere with ERISA's scheme, these laws are presumptively preempted.

Id. at 1505.

In Dillingham Construction N.A., Inc. v. County of Sonoma, 57 F.3d 712 (9th Cir. 1995), cert. granted, 116 S. Ct. 1415, 134 L. Ed. 2d 541 (1996), the court found that a California law requiring employers to pay apprentices prevailing wages unless the employer's apprentice program had been approved by the state was "related to" ERISA. In Dillingham, the state argued that the payment of wages was a traditional area of state regulation and was not an employee welfare benefit plan under ERISA. The court noted that while the payment of wages alone did not give rise to an employee benefit plan, an apprenticeship training program was an employee benefit plan for purposes of ERISA. 57 F.3d at 719. Thus, the court held that as long as the wage law related to an apprenticeship training program which was an employee benefit plan under ERISA, the fact that the law did not itself constitute an employee benefit plan was immaterial. Id.

Similarly, in this case the fact that Hawaii's mechanic's lien statute does not directly address ERISA issues is immaterial since the statute is clearly being used to circumvent ERISA. Respondents are now trying to artfully plead their way out from under ERISA by stating that Hawaii's mechanic's lien statute does not "relate to" ERISA. Since this case and Dillingham share a number of common issues, certiorari should be granted in this case as well.

It is "[n]ot the semantics of the word, 'relate,' but the policy of the [ERISA preemption] statute [that] requires preemption." Pohl v. National Benefits Consultants, Inc., 956 F.2d 126, 128 (7th Cir. 1992). Further, the ERISA preemption provision "is to be broadly construed and extends to common law tort and contract actions." Gibson v. Prudential Insurance Company, 915 F.2d 414, 416 (9th Cir. 1990).

Here, Respondents have claimed that the current dispute is merely a contract wage dispute that does not involve ERISA. However, in light of the express holding in Gibson, supra, that ERISA's preemption clause extends to contract actions, Respondents' attempt to circumvent ERISA through Hawaii's mechanic's lien statute should also be preempted.

B. Respondents' Reliance on ERISA Provisions in Their Applications for Mechanic's Liens Requires Preemption.

Respondents stated in their applications for mechanic's liens that Yost and BCI "failed, refused and neglected to pay to Lienors HCTF the contributions mandated by said [Collective Bargaining] Agreements, 29 U.S.C. §185 and 29 U.S.C. §1132(g)." [Emphasis added.]

But enforcement of just such obligations to make contributions to multiemployer plans under the terms of a collective bargaining agreement is expressly addressed by ERISA pursuant to 29 U.S.C. § 1145. ERISA also provides for exclusive federal jurisdiction of civil actions pursuant to 29 U.S.C. § 1132 which states, in pertinent part:

> Except for actions under subsection (a)(1)(B), the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary or fiduciary.

29 U.S.C. § 1132(e)(1) [emphasis added].

As evidenced by the express language of 29 U.S.C. § 1132 (e)(1) above and the existing case law, Congress intended to preempt state law and "establish pension plan regulation as exclusively a federal concern." Pilot Life Insurance Company v. Dedeaux, 481 U.S. 41, 45-46, 107 S. Ct. 1549, 95 L. Ed. 2d 39 (1987).

In light of Respondents' express reliance on 29 U.S.C. § 1132(g) in their applications for mechanic's liens and Congress' intent to establish federal regulation of pension plans, it is clear that the Hawaii Supreme Court erred in deciding that the use of Hawaii's mechanic's lien statutes to recover unpaid ERISA trust fund contributions was not "related to" ERISA and therefore not preempted. The express inclusion of ERISA as a grounds for recovering the unpaid trust fund contributions in Respondents' lien applications clearly raises a federal question. Even if Respondents amended their applications to remove the reference to ERISA, it is clear that Respondents have already acknowledged that ERISA is related to their claim.

III. The Question Presented Is Important.

As discussed above, Respondents have attempted to use Hawaii's mechanic's lien statutes to circumvent Congress' intent to establish federal regulation of pension plans. With state courts divided over the issue of preemption where mechanic's lien statutes neutral on their face are used to circumvent ERISA provisions, widespread litigation of this issue is bound to occur unless this Court grants certiorari. Further, as more state courts adhere to the notion that mechanic's lien statutes may be used to recover unpaid ERISA trust fund contributions without interpreting trust fund provisions in accordance with ERISA, Congress' intent to create uniform federal regulation of pension plans will be thwarted.

As discussed by the Ninth Circuit in Trustees of the Electrical Workers Health and Welfare Trust v. Marjo Corporation, 988 F.2d 865 (9th Cir. 1993), to the extent that the enforcement mechanism of a state's statute "supplements those provided by ERISA, it is preempted." 988 F.2d at 867. The Ninth Circuit also noted that the broad language of this Court in Pilot Life and Metropolitan Life, supra, supported its

conclusion that the Nevada statute in question which made general contractors liable for the obligations of their subcontractors was preempted by ERISA where the statute was being used to enforce the provisions of an employee benefit plan. Id. at 867-868.

Finally, the Ninth Circuit rejected the notion that Congress narrowed the ERISA preemption provision when it enacted the 1980 amendments to ERISA. Id. at 868. Further, the court noted that there was no support for concluding that "Congress intended to allow each state to expand liability for contributions to ERISA plans as it sees fit." Id.

The authorities discussed above conflict with the Hawaii Supreme Court's decision in Maui Prince, supra, and strongly support review of this case. Before this conflict between federal and state judiciaries multiplies further, this Court has an opportunity to address the preemption issue and bring much-needed certainty and uniformity to an area which Congress unmistakably intended to regulate by enacting ERISA.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

John S. Edmunds
Edmunds & Verga
841 Bishop Street, Suite 2104
Honolulu, Hawaii 96813-3945
(808) 524-2000
Counsel of Record

Appendix

IN THE SUPREME COURT OF THE STATE OF HAWAI`I

---o0o---

SUMMARY DISPOSITION ORDER NO. 96-13

Upon careful review of the record and the briefs submitted by the parties and having given due consideration to the arguments made and the issues raised by the parties,

IT IS HEREBY ORDERED that the judgments or orders from which appeal is taken in each appeal set out below are affirmed, reversed, or vacated and remanded as indicated:

Number	Case Name	Disposition
16042 (S.P.P. No. 91-0038)	Shaw v. State	Affirmed
16727 (S.P.P. No. 92-0029)	Wiggin v. State	Affirmed
16994 (S.P.P. No. 92-4723)	Wiggin v. State	Affirmed

17055	State v. Griffin (FC-Cr. No. 92-3941)	Vacate and remand consistent with Hicks, 71 Haw. 564, 798 P.2d 906 (1990)
17796	Goebel v. Fujimori (DC Civ. No. 1SS94-0008)	Affirmed
18251	Ahana v. The American Insurance Co. (Civ. No. 93-1981)	Vacate and remand consistent with Hawai`i Laborers Trust Funds, 81 Hawai`i 487, 918 P.2d 1143 (1996)
18378	State v. Varner (Cr. Nos. 93-0577(2) and 94-0079(3)	Affirmed
18489	Hawai`i Carpenters Trust Fund (M.L. No. 93-0139)	Vacate and remand consistent with Hawai`i Laborers Trust Funds, 81 Hawai`i 487, 918 P.2d 1143 (1996)

18519 (M.L. No. 93-0140)	Hawai`i Carpenters Trust Fund	Vacate and remand consistent with Hawai`i Laborers Trust Funds, 81 Hawai`i 487, 918 P.2d 1143 (1996)
18798 (Cr. No. 94-0831)	State v. Williams	Affirmed
18968 (S.P.P. No. 94-0002(1)	Martinez v. State	Affirmed
19000 (Cr. No. 94-1181)	State v. Ho	Affirmed
19244 (FC-Cr. No. 95-2199)	State v. Oliviera	Affirmed
19503 (DC Case Nos. 4205148MO, 4205149MO, 4205825MO, 4205826MO)	State v. Ketchmark	Affirmed
19519 (Cr. No. 95-4284)	State v. Feliciano	Affirmed

DATED: Honolulu, Hawai`i, September 10, 1996.

NOTICE AND JUDGMENT ON APPEAL

and

CERTIFICATE OF SERVICE

TAM, O'CONNOR & HENDERSON

Attorneys At Law
A Law Corporation

JAMES K. TAM 1485
ASHLEY K. IKEDA 2955
WESLEY K. IKEDA 1776
220 South King Street, Suite 2000
Honolulu, Hawaii 96813
Telephone No.: 545-3030

Attorneys for Lienors-Appellants

NOTICE AND JUDGMENT ON APPEAL

TO THE HONORABLE PRESIDING JUDGE OF THE CIRCUIT COURT OF THE FIRST CIRCUIT, STATE OF HAWAI`I:

PLEASE TAKE NOTICE the following Judgment on Appeal is entered this day by the Supreme Court of the State of Hawai`i:

Pursuant to the Summary Disposition Order No. 96-13 of the Supreme Court entered on September 10, 1996, the "Judgment Dismissing Lien Application" of the Circuit Court of the First Circuit, State of Hawaii, entered on October 13, 1994, is vacated and this matter is remanded back to the Circuit Court of the First Circuit, State of Hawaii, for further disposition consistent with Hawai`i Laborers' Trust Funds v. Maui Prince Hotel, 81 Haw. 487, 918 P.2d 1143 (Haw. 1996).

DATED: Honolulu, Hawaii, October 10, 1996.

BY THE COURT:

K. Hiyamura
Clerk

APPROVED:

Mario R. Ramil
Justice of the Hawai`i Supreme Court

HAWAI'I LABORERS' TRUST FUNDS, (Health & Welfare Trust Fund by James L. Tom, Lito Alcantra, John Murchison, Harry Ushijima, Mel Cremer, Larry Cadiz, Manuel Oliveira, and Benjamin Saguibo; Pension Trust Fund by Richard Hirano, Charles Miyata, Ernie Bello, Randall Ching, Wilton Ching, Kathy Yoshikami, Robert Sueda, Norman Janicki, Jr., Larry Cadiz, Mel Cremer, Norman Janicki, Sr., Benjamin Saguibo, Marilyn Tanaka, and Larry Sadaba; Training Trust Fund by Stanley Wada, Gilbert Ho, Richard Honjiyo, John Murchison, Manuel Oliveira, Alvis McCann, Benjamin Saguibo, and Ryan Tohara; Vacation & Holiday Trust Fund by Robert Sueda, Tamateru Kodama, Leonard Song, Salvador Ambrocio, Ismael Solis and Mitchell Kalilimoku; Annuity Trust Fund by Richard Honjiyo, Walter Arakaki, Tamateru Kodama, Robert Sueda, Salvador Ambrocio, Rick Pagatpatan, Mitchell Kalilimoku, and Clayton Saguibo), Lienors-Appellants,

v.

MAUI PRINCE HOTEL, a Hawai'i corporation, and Makena Resort Corp., formerly known as Seibu Hawai'i, Inc., a Hawai'i corporation, Owner/Developer-Appellees; and Greenscape, Ltd., a California corporation, Contractor- Appellee; and Hunnicutt International, Inc., a Hawai'i corporation, Contractor-Appellee.

HAWAI'I LABORERS' TRUST FUNDS, (Health & Welfare Trust Fund by James L. Tom, Lito Alcantra,

John Murchison, Harry Ushijima, Mel Cremer, Larry Cadiz, Manuel Oliveira, and Benjamin Saguibo; Pension Trust Fund by Richard Hirano, Charles Miyata, Ernie Bello, Randall Ching, Wilton Ching, Kathy Yoshikami, Robert Sueda, Norman Janicki, Jr., Larry Cadiz, Mel Cremer, Norman Janicki, Sr., Benjamin Saguibo, Marilyn Tanaka, and Larry Sadaba; Training Trust Fund by Stanley Wada, Gilbert Ho, Richard Honjiyo, John Murchison, Manuel Oliveira, Alvis McCann, Benjamin Saguibo, and Ryan Tohara; Vacation & Holiday Trust Fund by Robert Sueda, Tamateru Kodama, Leonard Song, Salvador Ambrocio, Ismael Solis and Mitchell Kalilimoku; Annuity Trust Fund by Richard Honjiyo, Walter Arakaki, Tamateru Kodama, Robert Sueda, Salvador Ambrocio, Rick Pagatpatan, Mitchell Kalilimoku, and Clayton Saguibo), Lienors-Appellants,

v.

WAILEA RESORT COMPANY, LTD., a Hawai'i corporation, Owner-Appellee; and Greenscape, Ltd., a California corporation, Contractor-Appellee; and Hunnicutt International, Inc., a Hawai'i corporation, Contractor-Appellee.

HAWAI'I LABORERS' TRUST FUNDS, (Health & Welfare Trust Fund by James L. Tom, Harry Ushijima, Lito Alcantra, John Murchison, Mel Cremer, Benjamin Saguibo, Manuel Oliveira, and Larry Cadiz; Pension Trust Fund by Richard Hirano, Stanley Wada, Ernie Bello, Randall Ching, Wilton Ching, Robert Sueda,

Louanne Kam, Norman Janicki, Jr., Benjamin Saguibo, Mel Cremer, Norman Janicki, Sr., Larry Cadiz, Marilyn Tanaka, and Larry Sadaba; Training Trust Fund by Richard Honjiyo, Ryan Y. Wada, Gilbert Ho, John Murchison, Benjamin Saguibo, Alvis McCann, Manuel Oliveira, and Ryan Tohara; Vacation & Holiday Trust Fund by Tamateru Kodama, Robert Sueda, Leonard Song, Salvador Ambrocio, Benjamin Saguibo and Ismael Solis; Annuity Trust Fund by Walter Arakaki, Richard Honjiyo, Tamateru Kodama, Robert Sueda, Melvin Kalama, Salvador Ambrocio, Clayton Saguibo, and Rick Pagatpatan), Plaintiffs-Appellants,

v.

WAILEA RESORT COMPANY, LTD., a Hawai'i corporation, Defendants-Appellees; and John Does, 1-10, Defendants.

HAWAI'I LABORERS' TRUST FUNDS, (Health & Welfare Trust Fund by James L. Tom, Harry Ushijima, Lito Alcantra, John Murchison, Mel Cremer, Benjamin Saguibo, Manuel Oliveira, and Larry Cadiz; Pension Trust Fund by Richard Hirano, Stanley Wada, Ernie Bello, Randall Ching, Wilton Ching, Robert Sueda, Louanne Kam, Norman Janicki, Jr., Benjamin Saguibo, Mel Cremer, Norman Janicki, Sr., Larry Cadiz, Marilyn Tanaka, and Larry Sadaba; Training Trust Fund by Richard Honjiyo, Ryan Y. Wada, Gilbert Ho, John Murchison, Benjamin Saguibo, Alvis McCann, Manuel Oliveira, and Ryan Tohara; Vacation &

Holiday Trust Fund by Tamateru Kodama, Robert Sueda, Leonard Song, Salvador Ambrocio, Benjamin Saguibo, and Ismael Solis; Annuity Trust Fund by Walter Arakaki, Richard Honjiyo, Tamateru Kodama, Robert Sueda, Melvin Kalama, Salvador Ambrocio, Clayton Saguibo, and Rick Pagatpatan), Plaintiffs-Appellants,

v.

MAUI PRINCE HOTEL CORP., a Hawai'i corporation, and Makena Resort Corporation, a Hawai'i corporation, Defendants-Appellees; and John Does 1-10, Defendants.

Nos. 18266 [1] to 18269.

Supreme Court of Hawai'i.
June 18, 1996.

Hawai'i Laborers' Trust Fund brought action to foreclose its mechanic's and materialman's liens on owners' properties to collect judgment against their subcontractor's for delinquent Employee Retirement Income Security Act (ERISA) trust fund contributions as required by labor agreements. The Second Circuit Court dismissed on ERISA preemption grounds, and Fund appealed. The

1 By order dated September 6, 1994, this court consolidated Nos. 18266, 18267, 18268, and 18269. Nos. 18266 and 18269 are companion mechanics' lien and foreclosure actions by the Hawai'i Laborers' Trust Funds against the Maui Prince Hotel and Makena Resort Corporation. Likewise, Nos. 18267 and 18268 are companion mechanics' lien and foreclosure actions by the Hawai'i Laborers' Trust Funds against Wailea Resort Company, Ltd.

Supreme Court, Ramil, J., held that: (1) Hawai'i State Mechanic's and Materialman's Lien Law was law of general applicability not expressly preempted by ERISA, and (2) use of Hawai'i's Mechanic's and Materialman's Lien Law to assist with collection process was consistent with intent of ERISA to promote prompt payment of employee benefit plan contributions, so as not to be impliedly preempted.

Vacated and remanded.

[1] PENSIONS k22
STATES k18.51

State law of general applicability is not expressly preempted by ERISA because it has only "tenuous, remote, or peripheral" connection with covered plans and does not fall within ERISA's sphere of regulation. Employee Retirement Income Security Act of 1974, § 514(a), as amended, 29 U.S.C.A. § 1144(a).

[2] MECHANICS' LIENS k3
STATES k18.15

Hawai'i State Mechanic's and Materialman's Lien Law was not expressly preempted by ERISA; it had general applicability that did not relate to any employee benefit plan covered by ERISA in merely providing remedy available to certain class of creditors. Employee Retirement Income Security Act of 1974, § 514(a), as amended, 29 U.S.C.A. § 1144(a); HRS § 507-42.

[3] MECHANICS' LIENS k3
STATES k18.15

Use of Hawai'i's Mechanic's and Materialman's Lien Law to assist with collection process was consistent with intent of ERISA to promote prompt payment of employee benefit plan contributions, so as not to be impliedly preempted. Employee Retirement Income Security Act of 1974, §§ 514(a), 515, as amended, 29 U.S.C.A. §§ 1144(a), 1145; HRS § 507-42.

**1145 *489

Pablo P. Quiban (Reynaldo D. Graulty with him on the briefs of Graulty, Evangelista & Quiban), Honolulu, for lienors-appellants and plaintiffs-appellants Hawai'i Laborers' Trust Fund.

Susan Oki Mollway of Cades Schutte Fleming & Wright, on the briefs, Honolulu, **1146 *490 for owner/developer-appellees Maui Prince Hotel and Makena Resort Corp., contractor-appellee Greenscape, Ltd., and defendants-appellees Wailea Resort Company, Ltd.

Before MOON, C.J., and KLEIN, LEVINSON, NAKAYAMA and RAMIL, JJ.

RAMIL, Justice.

We are called upon to determine whether the Hawai'i State Mechanic's and Materialman's Lien Law,[2] in

[2] The Hawai'i Mechanic's and Materialman's Lien Law is the lineal descendant of a measure adopted by the Legislative Assembly of the Kingdom of Hawai'i, Chapter XXI of the Laws of Hawai'i, 1888. Though the statute has been extensively amended, particularly in its procedural aspects, the essential purpose "to properly protect Mechanics and Materialmen who have furnished both time and material for others" has not been altered.

collecting delinquent trust fund contributions, is preempted by the Employee Retirement Income Security Act of 1974 (ERISA).[3] Specifically, we are faced with the question of whether Hawai'i Revised Statutes (HRS) § 507-42 (1993)[4] may be used to effectuate the judgment of a federal district court, in order to recover delinquent ERISA contributions due the Hawai'i Laborers' Trust Fund (HLTF) on behalf of laborers who performed labor and improvements on the subject lien property. We hold that HRS § 507-42 is not

Hawai'i Carpenters' Trust Funds v. Aloe, 63 Haw. 566, 571, 633 P.2d 1106, 1109 (1981).

[3] ERISA's preemption clause states that ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." ERISA § 514(a), 29 U.S.C. § 1144(a) (1988).

[4] HRS § 507-42 (1993) provides:

> **When allowed; lessees, etc.** Any person or association of persons furnishing labor or material in the improvement of real property shall have a lien upon the improvement as well as upon the interest of the owner of the improvement in the real property upon which the same is situated, or for the benefit of which the same was constructed, for the price agreed to be paid (if the price does not exceed the value of the labor and materials), or if the price exceeds the value thereof or if no price is agreed upon by the contracting parties, for fair and reasonable value of all labor and materials covered by their contract, express or implied.
>
> Where the terms of a lease, contract of sale, or instrument creating a life tenancy require the improvement of the real property, the interest of the lessor, vendor, or remainderman in the improvement and the land upon which the same is situated shall likewise be subject to the lien, and any provision for forfeiture or other penalty against the lessee, vendee, or life tenant in case of the filing of a mechanic's or materialman's lien or actions to enforce the same, shall not affect the rights of lienors.

preempted by ERISA and, accordingly, HRS § 507-42 may be used by trust funds to collect delinquent trust fund contributions.

I. BACKGROUND

This action arises out of the construction of the Makena and Wailea golf courses, which are owned by defendants-appellees Maui Prince Hotel Corporation and Wailea Resort Company, Ltd. (collectively, "Owners") respectively. For both projects, defendant-appellee Greenscape, Ltd., ("General Contractor") was the general contractor; and on both projects, General Contractor subcontracted with defendant-appellee Hunnicutt International, Inc. ("Subcontractor") to provide landscape and construction work for the golf courses. On both of these projects, labor was furnished by members of the Laborers' International Union of North America, Local 368, AFL-CIO ("Union"). Subcontractor contracted with Union for work to be performed on each of the projects. As part of their agreement, Subcontractor executed and delivered to Union certain labor agreements covering landscape and construction laborers in the State of Hawai'i. Under these agreements, Subcontractor promised to make certain contributions to the HLTF for each hour of work performed by the laborers.

The dispute in this action arose when Subcontractor, who paid the laborers for their work, failed to make the agreed upon contributions to the laborers' ERISA trust fund

as required by the labor agreements.[5]

Upon completion of the projects, HLTF instituted civil actions against Subcontractor **1147 *491 in the United States District Court for the District of Hawai'i (Case No. 92-00590 DAE and Civil No. 92-00463 HMF), to recover the unpaid trust fund contributions. On October 14, 1992, a default judgment was entered in favor of HLTF and against Subcontractor, in the amount of $39,076.56, for Subcontractor's failure to answer or otherwise plead.

Upon receiving this favorable judgment from the federal district court, HLTF proceeded to enforce the judgment against Owners in the Second Circuit Court of the State of Hawai'i. Although Owners were not parties to the labor agreement between HLTF and Subcontractor, HLTF asserted that, under HRS § 507-42 (1993),[6] Owners were liable for Subcontractor's failure to pay the trust fund contributions because labor and improvements were furnished on their property.

HLTF's action to enforce the federal court judgment in the circuit court consisted of two separate applications for mechanic's and materialman's liens in accordance with the provisions of HRS § 507-42. The lien actions were

[5] HLTF alleges that Subcontractor had entered into a written agreement with Union and had "promised to contribute and pay employee benefit contributions once per month to the Trust Funds for each hour of work performed by Hunnicutt International, Inc.'s employees covered by the [collective bargaining agreement], together with liquidated damages, interest, attorney's fees, costs and disbursements," but that Subcontractor had failed to make these contributions.

[6] See supra note 4.

sought by HLTF to collect on the federal district court's judgment by attaching liens on Owners' real properties and improvements including both golf course projects. On April 21, 1993, an order directing a lien to attach was entered against both projects. On June 16, 1993, HLTF, asserting its right to foreclose on the liens that it had obtained, filed two separate actions to foreclose its mechanic's and materialman's liens.

Although they are not ERISA parties,[7] Owners filed separate motions to dismiss or, in the alternative, for summary judgment, on ERISA preemption grounds, to defeat the foreclosure action. Owners argued that HRS § 507-42 "related to" employee benefit plans, and was therefore preempted by ERISA. Concluding that the actions were preempted by ERISA, the circuit court granted Owners' motions.

The circuit court also considered and granted a motion made by HLTF to strike the affidavit of Gerald T. Johnson, who supported Owners' motion for summary judgment. In its order, the court concluded that the affidavit did not conform to Hawai'i Rules of Civil Procedure (HRCP) Rule 56(e) because the attached exhibits were not properly authenticated.

HLTF thereafter timely appealed. On September 6,

[7] ERISA relationships usually include: the trustees of the trust fund; the employer; and the employees or beneficiaries of the trust fund. Accordingly, the ERISA parties in this action are: HLTF, as trustees of the trust fund; Subcontractor, as the employer; and the members of HLTF who performed labor and improvements on Owners' property as the beneficiaries of the trust fund. Owners, however, are not ERISA parties because they were not a party or privy to the labor agreements.

1994, all four appeals (Supreme Court Nos. 18266, 18267, 18268, and 18269) were consolidated into the present case.

II. STANDARD OF REVIEW

We review the circuit court's grant of dismissal for want of subject matter jurisdiction[8] according to the standard set forth in *Norris v. Hawaiian Airlines, Inc.*, 74 Haw. 235, 842 P.2d 634 (1992), aff'd --- U.S. ----, 114 S.Ct. 2239, 129 L.Ed.2d 203 (1994). Reviewing an order granting a motion to dismiss on the ground that a claim was preempted by the Railway Labor Act, 45 U.S.C. §§ 151-188 (1988), this court announced that:

> [a] trial court's dismissal for lack of subject matter jurisdiction is a question of law, reviewable de novo. *McCarthy v. U.S.*, 850 F.2d 558, 560 (9th Cir.1988), cert. denied, 489 U.S. 1052, 109 S.Ct. 1312, 103 L.Ed.2d 581 (1989); *see also Moir v. Greater Cleveland Regional Transit Auth.*, 895 F.2d 266, 269 (6th Cir.1990). Moreover, we adopt the view of the Ninth Circuit Court of Appeals in *Love v. United* ****1148 *492** *States*, 871 F.2d 1488 (9th Cir.1989), *opinion amended on other grounds and superseded by Love v. United States*, 915 F.2d 1242 (9th Cir.1989):
>
> Our review [of a motion to dismiss for lack

[9] The circuit court in granting the motions to dismiss, or, in the alternative, for a summary judgment, did not indicate whether the case was dismissed or decided on summary judgment grounds. We do not believe that the disposition was based on the latter because the underlying affidavit supporting the summary judgment was stricken by the circuit court. Based on the record, it is apparent that the circuit court's granting of dismissal was based on lack of subject matter jurisdiction.

> of subject matter jurisdiction] is based on the contents of the complaint, the allegations of which we accept as true and construe in the light most favorable to the plaintiff.

Love, 871 F.2d at 1491 (citations omitted).

Norris, 74 Haw. at 240-41, 842 P.2d at 637 (brackets added).

III. DISCUSSION

A. Federal Preemption

To provide a framework for our analysis, we begin by first declaring that "the historic police powers of the States [are] not to be superseded by ... Federal Act unless that [is] the clear and manifest purpose of Congress." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516, 112 S.Ct. 2608, 2617, 120 L.Ed.2d 407 (1992) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 (1947)) (brackets in original). Indeed, the question of whether a certain state action is preempted by federal law is one of congressional intent. Accordingly, the purpose of Congress is the "ultimate touchstone." *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 138, 111 S.Ct. 478, 482, 112 L.Ed.2d 474 (1990) (quoting *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 208, 105 S.Ct. 1904, 1909-10, 85 L.Ed.2d 206 (1985) (quoting *Malone v. White Motor Corp.*, 435 U.S. 497, 504, 98 S.Ct. 1185, 1189-90, 55 L.Ed.2d 443 (1978))).

> Congress's purpose may be stated explicitly in a statute's language or contained implicitly in the

> statute's structure and purpose. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 [97 S.Ct. 1305, 1309, 51 L.Ed.2d 604] (1977). For example, state law is preempted if it actually conflicts with federal law, even in the absence of an express congressional command. *Pacific Gas & Elec. Co. v. Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 204 [103 S.Ct. 1713, 1722, 75 L.Ed.2d 752] (1983). State law also is preempted if federal law "so thoroughly occupies a legislative field as to make reasonable the inference that Congress left no room for the States to supplement it." *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 [102 S.Ct. 3014, 3022, 73 L.Ed.2d 664] (1982) (quoting *Rice*, 331 U.S. at 230 [67 S.Ct. at 1152]). Both of these principles of preemption apply in the case of ERISA.

Marilyn Klinger & James P. Diwik, *ERISA Preemption and the Surety*, 29 Tort & Ins. L.J. 111, 112 (1993).

Accordingly, the primary question before us is whether Congress, in ERISA, expressly or impliedly intended to preempt Hawai'i's generic mechanic's and materialman's lien law; and if Congress' intent is not "clear and manifest," we apply the basic rule disfavoring federal preemption of state laws. *Cipollone*, 505 U.S. at 516, 112 S.Ct. at 2617.

B. ERISA Preemption

In the introduction to the statute, Congress defined

the policy goals of ERISA: [9]

> ****1149 *493** [T]he policy of [ERISA is] *to protect* interstate commerce and *the interests of participants in employee benefit plans* and their beneficiaries, *by requiring the disclosure and reporting to participants and beneficiaries of financial and other information* with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

ERISA § 2(b), 29 U.S.C. § 1001(b) (1988) (emphases

[9] Pub.L. No. 93-406, 88 Stat. 829 (1974) (codified at 29 U.S.C. §§ 1001-1461 (1988)).

Shortly after ERISA's enactment, its constitutionality was challenged. The courts concluded that the Tenth Amendment [of the United States Constitution] ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.") posed no bar to ERISA's operation because Congress correctly determined that employee benefit plans affect interstate commerce and thus warrant federal intervention. Furthermore, preemption of contemporaneous state legislation was necessary to accomplish the legislative purposes of ERISA. Because the Supremacy Clause states that the "Constitution, and the Laws of the United States ... shall be the supreme law of the Land," the Constitution itself allows for preemption of state laws that "interfere with, or are contrary to the laws of Congress." However, the "exercise of federal supremacy is not lightly to be presumed."

Julie K. Swedback, *The Deemer Clause: A Legislative Savior for Self-Funded Health Insurance Plans Under the Employee Retirement Income Security Act of 1974*, 18 Wm. Mitchell L.Rev. 757, 769-70 (1992).

added).

Thus, Congress enacted ERISA in 1974 to protect plan participants and beneficiaries from abuses and mismanagement in the administration of employee pension and benefit plans. Secondly, Congress provided the preemption clause of § 514(a) to protect plan administrators from the "burden that would be imposed by a patchwork scheme of regulation." *Fort Halifax Packing Co., Inc. v. Coyne*, 482 U.S. 1, 11-12, 107 S.Ct. 2211, 2217, 96 L.Ed.2d 1 (1987).

> To enforce the goals of ERISA, the drafters developed a three-step process to determine the impact of ERISA on state laws. First, the drafters constructed a broad preemption clause stating, "Except as provided in subsection (b) of this section [the savings clause], the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter *relate to* any employee benefit plan...." ERISA § 514(a), 29 U.S.C. § 1144(a) (1988). Thus, "ERISA involved not only the creation of new law but also the displacement of a larger body of existing state law." James D. Hutchinson & David M. Ifshin, *Federal Preemption of State Law Under the Employee Retirement Income Act of 1974*, 46 U. Chi. L.Rev. 23, 34 (1978)....
>
> Second, to mitigate the harsh impact of the preemption clause on the displacement of state power, ERISA's drafters included a "savings clause," which returned to the states the power to regulate traditional areas of commerce--insurance,

> banking, and securities. [*See*] ERISA § 514(b)(2)(A), 29 U.S.C. § 1144(b)(2)(A) (1988). State law that regulates these areas is thus "saved" from the broad sweep of ERISA's preemption clause.
>
> Third, the drafters modified the scope of ERISA's savings clause through the "deemer clause." [*See*] ERISA § 514(b)(2)(B), 29 U.S.C. § 1144(b)(2)(B) (1988). The deemer clause qualifies the savings clause by providing that an employee benefit plan cannot be deemed an insurance company solely for the purpose of a state law which "purport[s] to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies." [*See*] ERISA § 514(b)(2)(B), 29 U.S.C. § 1144(b)(2)(B) (1988).

Swedback, *supra*, at 763-65 (brackets and emphasis added).

The United States Supreme Court has dealt extensively with statutory interpretation issues in ERISA. *See, e.g., FMC Corp. v. Holliday*, 498 U.S. 52, 111 S.Ct. 403, 112 L.Ed.2d 356 (1990); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 107 S.Ct. 1549, 95 L.Ed.2d 39 (1987); *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 105 S.Ct. 2380, 85 L.Ed.2d 728 (1985); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 103 S.Ct. 2890, 77 L.Ed.2d 490 (1983). Noting that courts must "begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose," *FMC Corp.*, 498 U.S. at 57, 111 S.Ct. at 407 (quoting *Park 'N Fly, Inc. v. Dollar Park and Fly, Inc.*, 469 U.S. 189, 194, 105 S.Ct. 658, 661, 83

L.Ed.2d 582 (1985)), the United States Supreme Court carefully and consecutively addressed each significant phrase within section 514's clauses.

In measuring the breadth of ERISA's preemptive effect, the most obvious ambiguity concerns the meaning of "relates to."[10] Catherine L. Fisk, *The Last Article About the Language of ERISA Preemption? A Case Study of the Failure of Textualism*, 33 ****1150 *494** Harv. J. on Legis. 35, 47 (1996). In light of this ambiguity, HLTF contends that the trial court erred in holding that HRS § 507-42 "relates to" employee benefit plans.[11] We must therefore determine in the instant case whether HRS § 507-42 is expressly preempted by ERISA, *i.e* , whether HRS § 507-42 falls within the scope of ERISA's preemption clause. If not explicitly preempted by ERISA, the next question is whether HRS § 507-42 conflicts with ERISA and thus is impliedly preempted. In doing so, we must first examine cases decided by the Supreme Court that address the term "relate to."

1. Cases Addressing the Term "Relate To"

Shaw, supra, represents the Court's first look at the scope of ERISA's preemption clause. In the early 1980s,

[10] *See supra* note 3. In order to measure the breadth of ERISA's preemptive effect, the Court had to define which state laws "related to" employee benefit plans.

[11] HLTF also contends that the trial court erred as a matter of law in admitting into evidence documents that were not supported by any affidavit. Because we are reviewing the trial court's dismissal for lack of subject matter jurisdiction and not on the court's summary judgment rulings, we will not address HLTF's second contention on appeal.

several airlines and other employers sought injunctive relief in federal court regarding the pregnancy provisions of the New York Human Rights Law and the New York Disability Benefits Law. *Shaw*, 463 U.S. at 88, 103 S.Ct. at 2895. The combined effect of the laws forbade employment discrimination on the basis of pregnancy and required employers to offer disability benefits for pregnancy and other nonoccupational disabilities. *Id.* at 88-90, 103 S.Ct. at 2895-96.

The employers argued that, insofar as the New York Human Rights Law related to employee benefit plans, ERISA operated to preempt state law. *Id.* at 92, 103 S.Ct. at 2897. Seeking the broadest interpretation of the preemption clause, the employers claimed that the state could not directly regulate ERISA-covered benefit plans. *Id.* at 100-01, 103 S.Ct. at 2901-02. On the other hand, the New York Commission of Human Rights focused on section 514(d) of ERISA which provides, "s 514(a) [the preemption clause] shall not 'be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States.' " *Id.* The Commissioner contended that New York's Human Rights Law provided "a means of enforcing the Pregnancy Discrimination Act of 1978 which made discrimination based on pregnancy unlawful under Title VII of the Civil Rights Act of 1964." *Id.*

The United States Supreme Court held that the New York Humans Rights Law and Disability Benefits Law most definitely related to employee benefit plans. *Id.* at 96, 103 S.Ct. at 2899-2900. Applying the "plain meaning test," by

adopting the *Black's Law Dictionary* definition,[12] the Court held that, "[a] law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan." *Id.* at 96-97, 103 S.Ct. at 2900. Because the New York Human Rights Law "has a connection with or reference to" employee benefit plans, the law could be preempted, but "only insofar as it prohibit[ed] practices that [are] lawful under federal law." *Id.* at 108, 103 S.Ct. at 2906.

Following *Shaw*, the United States Supreme Court in *Metropolitan Life Ins., supra*, addressed ERISA preemption involving a Massachusetts statute that required minimum mental health care benefits for residents covered by general health insurance policies. Noting that the ERISA preemption clauses were "perhaps not a model of legislative drafting," the Court held that, although the Massachusetts's statute related to employee benefit plans, it was not preempted by ERISA because the state statute was one that regulated insurance. *Metropolitan Life Ins.*, 471 U.S. at 739, 105 S.Ct. at 2388-89.

In 1987, the Court, in *Pilot Life Ins., supra,* addressed ERISA preemption that concerned common law contract and tort claims against an insurance company that issued a group employer's policy. The Court held that:

> ****1151 *495** [t]here is no dispute that the common law causes of action asserted in Dedeaux's

[12] " 'Relate. To stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with.' " *Shaw*, 463 U.S. at 97 n. 16, 103 S.Ct. at 2900 n. 16 (quoting *Black's Law Dictionary* 1288 (6th ed.1990)).

> complaint "related to" an employee benefit plan and therefore fall under ERISA's express preemption clause, § 514(a). In both *Metropolitan Life Ins.* and *Shaw*, we noted the expansive sweep of the pre-emption clause. In both cases "[t]he phrase 'related to' was given its broad common-sense meaning, such that a state law 'relate[s] to' a benefit plan 'in the normal sense of the phrase, if it has a connection with or reference to such a plan[.]' "

Pilot Life Ins., 481 U.S. at 47, 107 S.Ct. at 1553 (citation omitted). *See also The Meadows v. Employers Health Ins.*, 47 F.3d 1006, 1008-09 (9th Cir.1995).

In 1988, the Court clarified the preemption issue in *Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825, 108 S.Ct. 2182, 100 L.Ed.2d 836 (1988). In Mackey, the issue concerned the extent to which ERISA preempts Georgia's general garnishment statute and a specific Georgia statute expressly governing the garnishment of benefits due to employee welfare benefit plan participants. The issue was before the Court because judgment creditors of plan participants were attempting to garnish the plan participants' benefits.

The Court had no trouble in concluding that Georgia's specific benefit garnishment statute "relates to" an employee benefit plan and is therefore preempted. As the Court stated, "[t]he Georgia statute at issue here expressly refers to--indeed, solely applies to--ERISA employee benefit plans." *Id.* at 829, 108 S.Ct. at 2185. Of particular interest is the Court's further comment:

> The possibility that [the Georgia statute] was

> enacted by the Georgia Legislature to help effectuate ERISA's underlying purpose ... is not enough to save the state law from pre-emption. "The pre-emption provision [of § 514(a)] ... displace[s] all state laws that fall within its sphere, even including state laws that are consistent with ERISA's substantive requirements."

Id.

With respect to Georgia's general garnishment statute, the Court held that employee welfare benefit plan payments can be garnished because ERISA does not preempt such state laws. The Court so held notwithstanding the argument that plan administrators become parties to a suit when an employee welfare benefit plan is garnished and must respond and deposit the demanded funds due the beneficiary-debtor, thereby incurring administrative burdens and costs. The Court held that Congress did not intend to forbid the use of state-law execution mechanisms against welfare benefit plan participants, even when those mechanisms prevent those participants from receiving their benefits. *Id.* at 836, 108 S.Ct. at 2188-89.

In 1990, the United States Supreme Court addressed ERISA preemption in yet another case, *FMC Corp., supra,* relating to the subrogation of medical expenses. The Court held that the Pennsylvania statute in question had a "reference" to benefit plans governed by ERISA inasmuch as:

> [t]he statute states that "[i]n actions arising out of the maintenance or use of a motor vehicle, there

> shall be no right of subrogation or reimbursement from claimants' tort recovery with respect to ... benefits ... paid or payable under section 1719." Section 1719 refers to "[a]ny program, group contract or other arrangement for payment of benefits." These terms "includ[e], but [are] not limited to, benefits payable by a hospital plan corporation or a professional health service corporation."

FMC Corp, 498 U.S. at 59, 111 S.Ct. at 408 (brackets added).

Another example of the Supreme Court's treatment of ERISA preemption is *Ingersoll-Rand, supra*. *Ingersoll-Rand* addressed whether ERISA preempts a state common-law claim that an employee was discharged unlawfully in order to prevent his attainment of benefits under an ERISA plan. *Ingersoll-Rand*, 498 U.S. at 137-38, 111 S.Ct. at 481-82. After emphasizing the breadth of the preemption clause, the Court explained the basis for that expansive scope:

> The key to § [514(a)] is found in the words "relate to." Congress used those words in their broad sense, rejecting more limited pre-emption language.... Moreover, ***496 ****1152** to underscore its intent that § [514(a)] be expansively applied, Congress used equally broad language in defining the "State law" that would be pre-empted. Such laws include "all laws, decisions, rules, regulations, or other State action having the effect of law." 29 U.S.C. § 1144(c)(1).

Id. at 138-39, 111 S.Ct. at 482-83 (brackets added).

The *Ingersoll-Rand* Court went even further and stated that the state law must relate to a benefit "plan" in order for preemption to apply. *Id.* at 139, 111 S.Ct. at 482-83. The distinction between an ERISA plan and benefits was emphasized in *Fort Halifax Packing, supra,* where the Court said:

> The purposes of ERISA's pre-emption provision make clear that the ... statute in no way raises the types of concerns that prompted pre-emption. Congress intended pre-emption to afford employers the advantages of a uniform set of administrative procedures governed by a single set of regulations. This concern only arises, however, with respect to benefits whose provision by nature requires an ongoing administrative program to meet the employer's obligations. It is for this reason that Congress pre-empted state laws relating to plans, rather than simply to benefits. Only a plan embodies a set of administrative practices vulnerable to the burden that would be imposed by a patchwork scheme of regulation.

Fort Halifax Packing, 482 U.S. at 11-12, 107 S.Ct. at 2217-18.

"Thus, in order to prevail, a plaintiff must plead, and the court must find, that an ERISA plan exists and the employer had a pension-defeating motive in terminating the employment." *Ingersoll-Rand*, 498 U.S. at 140, 111 S.Ct. at 483. Because the court's inquiry must be directed to the plan, this judicially created cause of action "relate[s] to" an

ERISA plan as opposed to benefits. *Id.*

In 1992, the Supreme Court dealt with ERISA preemption concerning a state statute involving health insurance coverage for injured workers eligible for workers' compensation benefits in *District of Columbia v. Greater Washington Bd. of Trade*, 506 U.S. 125, 113 S.Ct. 580, 121 L.Ed.2d 513 (1992). The *Greater Washington* Court stated that a state law is not preempted by ERISA if the state law has only a "tenuous, remote, or peripheral" connection with covered plans as is the case with many laws of general applicability. *Id.* at 130 n. 1, (citing *Shaw*, 463 U.S. at 100, n. 21, 103 S.Ct. at 2901 n. 21; *Mackey*, 486 U.S. at 830-38 & n. 12, 108 S.Ct. at 2185-2190 & n. 12).

[1] Thus, in summary, the Court, recognizing that "Congress intended pre-emption to afford employers the advantages of a uniform set of administrative procedures governed by a single set of regulations[,]" *see Fort Halifax Packing*, 482 U.S. at 11-12, 107 S.Ct. at 2217, has held that a state law directed at or having a reference to employee benefit plans, even if consistent with ERISA's substantive requirements, *see Mackey*, 486 U.S. at 829, 108 S.Ct. at 2185, "relates to" employee benefit plans and is thus expressly preempted by ERISA. It therefore follows that, under *Mackey* and *Greater Washington, supra*, a state law of general applicability is not expressly preempted by ERISA because it has only a "tenuous, remote, or peripheral" connection with covered plans.[13] In other

[13] *See, e.g., United Wire v. Morristown Memorial Hospital*, 995 F.2d 1179, 1192 (3rd Cir.1993) (holding that "[a] rule of law relates to an ERISA plan, if it singles out such plans for special treatment, or if the

words, state laws of general applicability do not fall within ERISA's sphere of regulation.

2. Mechanic's Lien

Because the United States Supreme Court has never specifically addressed whether a neutral and generic state mechanic's and materialman's lien law, such as HRS § 507-42, "relates to" and is therefore expressly **1153 *497 preempted by ERISA,[14] we look to *Plumber's Local 458 Holiday Vacation Fund v. Howard Immel, Inc.*, 151 Wis.2d 233, 445 N.W.2d 43 (App.1989), which is directly on point factually with the instant case. In *Immel*, an employee benefit plan sought to enforce a construction lien

rights or restrictions it creates are predicated on the existence of such a plan."); *Vartanian v. Monsanto Co.*, 822 F.Supp. 36, 42 (D.Mass.1993) (holding that ERISA does not automatically preempt all actions involving pension plans because it does not automatically preempt state laws that have only a tenuous, remote, peripheral impact); *Westhoven v. Lincoln Foodservice Products*, 616 N.E.2d 778, 781 (Ind.Ct.App.1993).

[14] The Ninth Circuit Court of Appeals addressed the State of Nevada's law making a general contractor liable for the debts of his or her subcontractors in *Trustees of the Electrical Workers Health & Welfare Trust v. Marjo Corp.*, 988 F.2d 865 (9th Cir.1992). The Ninth Circuit held that the state law at issue in *Marjo* was preempted by ERISA to the extent that the state law's enforcement mechanism supplemented those provided by ERISA. Id. at 867. Furthermore, the California Supreme Court addressed California mechanic's lien law in *Carpenters Southern California Administrative Corp. v. El Capitan Development Co.*, 53 Cal.3d 1041, 282 Cal.Rptr. 277 811 P.2d 296 (Cal.1991) (en banc), cert. denied, 502 U.S. 963, 112 S.Ct. 430, 116 L.Ed.2d 450 (1991), and held that it was preempted by ERISA because the law was specifically designed for, and made reference to, ERISA. *Marjo* and *El Capitan* are distinguishable from the present case. Unlike the state laws at issue in *Marjo* and *El Capitan*, HRS § 507-42 is a neutral/general statute which was not enacted in relation to ERISA employee benefit plans.

provided by Wisconsin law against a construction project in an attempt to collect delinquent contributions owed by a judgment-proof employer.

The trial court concluded that the trust funds had a valid construction lien and, because the Wisconsin statute authorizing construction liens had only a "tenuous, remote and peripheral" effect on employee benefit plans, the Wisconsin statute was not preempted by ERISA. *Id.* 445 N.W.2d at 44. The Wisconsin lien statute,[15] similar to HRS § 507-42, benefited "any person furnishing labor."[16] *Id.* The Wisconsin Court of Appeals held that ERISA did not preempt a general creditor's rights created by Wisconsin law; hence, the employee benefit plan was able to use Wisconsin's construction lien statute to collect unpaid contributions due under the master labor agreement. *Id.* at 46.

[15] Wisconsin lien statute 779.036(1) states in pertinent parts: In any case in which an improvement is constructed or to be constructed pursuant to a contract and payment bond under s. 779.035, any person furnishing labor ... to any prime contractor or subcontractor shall have a lien on the money or other payment due or to become due the prime contractor or subcontractor; therefore, if the lienor, before payment is made to the prime contractor or subcontractor, gives written notice of the lienor's claim....

[16] Hawai'i's mechanic's lien statute, HRS § 507-42, is similar to the Wisconsin mechanic's lien statute in several respects: (1) both statutes contain language to protect the financial interests of "any person furnishing labor"; (2) both statutes have been characterized as being of a broad remedial nature and are liberally construed to effectuate the state's legislative intent of protecting the claims of laborers, tradesmen, and materialmen; (3) both statutes are of a generic nature; (4) both statutes create general creditors' rights; (5) both statutes operate independently of the establishment of an ERISA plan; and (6) neither statute refers to ERISA.

In addressing the issue of ERISA preemption, the Wisconsin Court of Appeals drew an analogy to the United States Supreme Court's ruling in *Mackey, supra*:

> The United States Supreme Court has held that Congress did not intend to prohibit the use of state law garnishment procedures to execute judgments against ERISA benefit plans. *Mackey*, 486 U.S. at 831-32 [108 S.Ct. at 2186- 87]. If plans may use state law to collect on a judgment against a plan, certainly ERISA does not preempt the plan's ability to use those procedures to collect a judgment on behalf of the plan.

Immel, 445 N.W.2d at 45. The *Mackey* court reasoned that if a state law may be asserted against a plan, then, equally, the plan may use that same state law against a third party. The Immel court commented that 29 U.S.C. § 1145 was the only ERISA provision relating to the collection of unpaid trust fund contributions.[17] *Id.*

Because none of the ERISA provisions has established any methods for collecting judgments on unpaid contributions, the *Immel* ****1154 *498** court held that *ERISA does not preempt ERISA-regulated funds from using state law available to general creditors to collect money*

[17] 29 U.S.C. § 1145 provides:

> Every employer who is obligated to make contributions to a multiemployer plan or under the terms of a collective bargained agreement shall, to the extend not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

judgments. *Id.* 445 N.W.2d at 45-46.

With that analysis, the *Immel* court focused on the generic nature of Wisconsin's construction lien statute, which did not refer to employee benefit plans. *Id.* at 46. The court stated that Wisconsin's lien statute provided a "remedy available to a certain class of creditors that transcends ERISA obligations and concerns." *Id.* The *Immel* court therefore held that ERISA did not preempt the use of Wisconsin's construction lien statute by employee benefit plans to recover fringe benefit contributions. *Id.*

3. HRS § 507-42 is Not Preempted by ERISA

Having reviewed state and federal case law relevant to the present case, we must now specifically determine whether Hawai'i's Mechanic's and Materialman's Lien Law, i.e., HRS § 507-42, "relates to" an ERISA plan. For the reasons set forth below, we hold that ERISA does not explicitly or implicitly preempt HRS § 507-42.

a. HRS § 507-42 Does Not "Relate To" or "Purport to Relate To" Employee Benefit Plans.

[2] As set forth in part III.B.1, *supra*, in 1992, the United States Supreme Court held in *Greater Washington*, *supra*, that, under section 514(a), ERISA shall supersede any and all state laws insofar as they "may now or hereinafter relate to" any employee benefit plan covered by ERISA. *Greater Washington*, 506 U.S. at 129, 113 S.Ct. at 583. Accordingly, there is no ERISA preemption "if the state law has only a 'tenuous, remote, or peripheral' connection with covered plans 'as is the case with many laws of general applicability.' " *Id.* at 130 n. 1, 113 S.Ct.

at 583 n. 1 (citing *Shaw*, 463 U.S. at 100 n. 21, 103 S.Ct. at 2901 n. 21; *Mackey*, 486 U.S. at 830-38, n. 12, 108 S.Ct. at 2185-90, n. 12).

The test for preemption as set forth by the Court is best illustrated through *Mackey, supra*. As discussed in part III.B.1, *supra*, the Supreme Court in *Mackey* distinguished between state statutes that "single[ ] out" ERISA employee welfare benefit plans, on the other hand, and state statutes that are more "general" in nature, on the other. The Supreme Court held that, while the former state statutes are preempted by ERISA, the latter state statutes are not.

Based on the Supreme Court's distinction in *Mackey*, we hold that HRS § 507- 42, which is similar to Wisconsin's lien statute discussed in Immel, *see* part III.B.2, *supra*, is not expressly preempted by ERISA because it is a law of general applicability that does not relate to any employee benefit plan covered by ERISA. HRS § 507-42 merely provides a "remedy available to a certain class of creditors that transcends ERISA obligations and concerns." *Immel*, 445 N.W.2d at 46.

b. Hawai'i's Lien Law is Not in Conflict with ERISA.

Given that the purpose of ERISA's preemption provision is to "afford employers [or fund trustees of multiemployer benefit plans] the advantages of a uniform set of administrative procedures" in order to avoid "the burden that would be imposed by a patchwork scheme of regulation," see *Fort Halifax Packing*, 482 U.S. at 11-12, 107 S.Ct. at 2217, it does not follow that the fund trustees themselves are preempted from using a state law available

to general creditors to collect money judgments. Indeed, under ERISA, trustees of multiemployer benefit plans are endowed with broad powers to collect fringe benefit contributions. Along with such powers, the trustees are responsible for collecting the contributions in a diligent, systematic, and reasonable manner. *Central States Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 573-74, 105 S.Ct. 2833, 2841-42, 86 L.Ed.2d 447 (1985).

The continuing problem of collecting employer contributions resulted in the enactment of the Multiemployer Pension Plan Amendments Act of 1980, P.L. 96-364, 94 Stat. 1208 (1980) (MPPA), in order to supplement ERISA. Additionally, Congress created a statutory cause of action by adding section 515 to ERISA, 29 U.S.C. § 1145. The intent of section 515 was "to promote the ****1155 *499** prompt payment of contributions and assist plans in recovering the costs incurred in connection with delinquencies." Staff of Sen. Comm. on Labor and Human Resources, 96th Cong., 2d Sess. S. 1076, *The Multiemployer Pension Plan Amendments of 1980: Summary and Analysis of Consideration* (Comm. Print 1980) at 43-44.

[3] Accordingly, in view of the policy reasons behind ERISA and MPPA, the use of Hawai'i's Mechanic's and Materialman's Lien Law, HRS § 507-42, to assist with the collection process, is consistent with this intent. Because Hawai'i's lien law is not in conflict with ERISA, it is not impliedly preempted.

c. Congressional Intent Disfavors ERISA Preemption of State Lien Laws.

Furthermore, in enacting the MMPA, Congress clearly sought to address the problems created by employer delinquencies in multiemployer benefit plans, to promote prompt payment of contributions, and to assist plans in recovering the costs incurred in connection with delinquencies. Staff of Sen. Comm. on Labor and Human Resources, 96th Cong., 2d Sess., S. 1076, *The Multiemployer Pension Plan Amendments of 1980: Summary and Analysis of Consideration* (Comm. Print 1980) at 43-44.

Congress never intended to prevent the trust funds from using any neutral state statute that did not relate to employee benefit plans. "The Committee amendment does not change any other type of remedy permitted under State or Federal Law with respect to delinquent multiemployer plan contributions." H.R.Rep. No. 869, 96th Cong., 2d Sess, *reprinted in* 1980 U.S.C.C.A.N. 2993, 3038.

Moreover, Congress's disfavor of ERISA preemption of state lien laws is apparent in a legislative proposal to clarify ERISA's preemption clause. Introduced on February 23, 1993, H.R. 1036 would amend ERISA section 514(b) to clarify that ERISA does not preempt state and local laws that provide additional remedies or other means for collection of employer contributions to an employee benefit plan. The bill was referred to the House Committee on Education and Labor and was approved by the full committee on June 23, 1993.

> A recent House of Representatives committee report suggests that Congress never intended at the time it enacted ERISA that the legislation would preempt state laws that provide a

general means to employee benefit plans for the collection of amounts lawfully due from employers. The report states:

> There is no indication that Congress intended ERISA to deny employee benefit plans and participants access to State law remedies and other means for collecting employer contributions, such as lien laws. To the contrary, Congress has expressly declared the effective collection of employer contributions by multiemployer plans to be an important policy concern of ERISA.

Thus, the congressional committee announced its intention to endorse the bill to counteract and clarify federal and state judicial decisions, discussed in this article, that reflect what Congress considers to be a

> disturbing tendency to uphold challenges to State laws establishing important worker protections on the basis of ERISA preemption, in spite of strong legal and policy evidence that Congress never intended these laws to be preempted. Among these are State laws affecting ... mechanics liens and other enforcement tools for multiemployer plans to collect delinquent pension contributions.

Apparently, Congress also has found that the courts' application of ERISA preemption inequitably distinguishes between two groups of persons: (1)

> those employees who are not members of ERISA plans and therefore may resort to the use of mechanic's liens and other state remedies to ensure that their employers fulfill their employee benefit obligations; and (2) those employees who are members of ERISA plans and whose only recourse for collecting delinquent employer contributions is federal law. The committee report concludes that this distinction was never the intent of Congress in enacting the ERISA **1156 *500 preemption provision. The congressional committee concluded its report by declaring that excepting state-law remedies or means for collection of contributions to employee benefit plans from ERISA's general rule of preemption not only would serve Congress's intent on the issue of preemption, but, more importantly, would advance the fundamental protective policies underlying ERISA by preserving pertinent state laws without interfering with the federal regulatory framework for employee benefit plans provided by ERISA.

Klinger, *supra*, at 127-28 (footnotes omitted). *See Sol v. AIG Hawai'i Ins. Co.*, 76 Hawai'i 304, 309, 875 P.2d 921, 926 (1994) (quoting *In the Interest of John Doe*, 76 Hawai'i 85, 92 n. 10, 869 P.2d 1304, 1310 n. 10 (1994) (quoting *Franks v. City and County of Honolulu*, 74 Haw. 328, 340 n. 6, 843 P.2d 668, 674 n. 6 (1993))) (" '[T]his court has used subsequent legislative history or amendments to confirm its interpretation of an earlier statutory provision.' ") (citation omitted).

In light of the legislative history and pending legislation noted above, it is apparent that Congress, having

declared that "effective collection of employer contributions by multiemployer plans to be an important policy concern of ERISA," *see* Klinger, *supra*, at 127, did not intend to deny employee benefit plans access to state enforcement tools to collect delinquent contributions.

d. ERISA Preemption in This Case "Would Ignore Relevant Federal Policy and Fly in the Face of Logic."

We have expressly recognized in *Hawai'i Carpenters' Trust Funds v. Aloe Development Corp.*, 63 Haw. 566, 633 P.2d 1106 (1981), that the trustees of employee benefit plans have a fiduciary duty to collect delinquent trust fund contributions, and, accordingly, may utilize HRS § 507-42 in the discharge of their fiduciary duties to the beneficiaries of the HLTF.[18]

In *Aloe*, the general contractor appealed the circuit court's decision allowing a lien by the lienors-trustees of the employee benefit trust fund on land and improvements, pursuant to HRS § 507-42, in an attempt to enforce the employer's obligation to make fund contributions required under the collective bargaining agreement. *Id.* at 573, 633 P.2d at 1110.

[18] Owners contend that, in light of the fact that *Aloe* has never been cited in any published opinion in connection with any analysis of the ERISA preemption, "*Aloe* does not provide any precedent on which to base a reversal of the circuit court's decisions." We disagree. *Aloe* is important for the purpose of the appeal before us because it discusses in depth the policies of HRS § 507-42, the HLTF trustees' heavy reliance on state laws when managing the affairs of the trust fund, and the consequences of HRS § 507-42 being preempted. For these important reasons, we will not disregard *Aloe* for the sole reason that no published opinion regarding ERISA preemption has cited *Aloe*.

The *Aloe* court explained:

"Congress directed that union welfare funds be established as written formal trusts, and that the assets be 'held in trust' and be administered 'for the sole and exclusive benefit of the employees ... and their families and dependents....' 29 U.S.C. § 186(c)(5)." *NLRB v. Amax Coal Co.*, [453] U.S. [322, 329, 101 S.Ct. 2789, 2794, 69 L.Ed.2d 672] (1981). And in approving ERISA, Congress "essentially codified the strict fiduciary standards that a § 302(c)(5) trustee must meet." *Id.* Therefore, "ERISA requires a trustee to 'discharge his duties ... solely in the interest of the participants and beneficiaries....' 29 U.S.C. § 1104(a)(1)." *Id.* at 332, 101 S.Ct. at 2796 (footnote omitted). "Indeed, the trustees have an obligation to *enforce* the terms of the collective bargaining agreement regarding employee fund contributions against the employer 'for the sole benefit of the beneficiaries of the fund.' " *Id.* at 336-37, 101 S.Ct. at 2798 (*quoting United States v. Carter*, 353 U.S. 210, 220 [77 S.Ct. 793, 798, 1 L.Ed.2d 776] (1957)) (emphasis in the original). A determination that the trustees of the Hawai'i Carpenters' Trust Funds may not seek the aid of our mechanic's lien law in discharging this obligation would ignore relevant federal policy and fly in the face of logic.
* * * *

****1157 *501** The remedial aspects of HRS § 507-42 have been construed liberally during its long history to accomplish a beneficent purpose of properly protecting "Mechanics and Materialmen

> who have furnished both time and material for others." *See* [Rep. No. 69 of the Judiciary Comm., Legis. Assembly--Session, 1888]. We perceive no basis for now concluding they are devoid of a capacity for adjustment to changing patterns of compensation induced by collective bargaining under the federal regime. We would not be recognizing the "vintage" qualities of our lien law if we were to hold it lacks such vitality.

Aloe, 63 Haw. at 576-77, 633 P.2d at 1112-13 (footnotes omitted) (emphasis and brackets added).

As indicated in *Aloe*, it is within the state's sovereign powers to determine that laborers enjoy superior creditor priority than that of other creditors who may have a financial interest in the assets of an owner who has made improvements on his or her property. Furthermore, a state has a right and obligation to protect the interests of its citizens within its borders. Therefore, by allowing ERISA beneficiaries to collect delinquent funds, Hawai'i is protecting those whom it is obligated to serve. As noted in *Metropolitan Life Ins., supra,*

> "States traditionally have had great latitude under their police powers to legislate as 'to the protection of the lives, limbs, health, comfort, and quiet of all persons.' " *Slaughter-House Cases*, 16 Wall. 36, 62 [21 L.Ed. 394] (1873), quoting *Thorpe v. Rutland & Burlington R. Co.*, 27 Vt. 140, 149 (1855). "States possess broad authority under their police powers to regulate the employment relationship to protect workers within the State."

Metropolitan Life Ins., 471 U.S. at 756, 105 S.Ct. at 2398.

IV. CONCLUSION

Based upon the foregoing, we hold that ERISA does not preempt HRS § 507-42. Accordingly, we vacate the decision of the circuit court and remand with instructions to proceed on the foreclosure of the subject lien properties.

END OF DOCUMENT

Copr. (C) West 1997 No claim to orig. U.S. govt. works

Supreme Court, U.S.
FILED

961651 JAN 8 1997

No. OFFICE OF THE CLERK

In the
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

WCC Associates, Birtcher/BCI, *Petitioners*

v.

Hawaii Carpenters Trust Funds, *Respondent*.

On Petition for a Writ of Certiorari to the
Supreme Court of Hawaii

SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

John S. Edmunds
Edmunds & Verga
841 Bishop Street, Suite 2104
Honolulu, Hawaii 96813-3945
(808) 524-2000
Counsel of Record

October 1996

25 pp

APPENDIX A

TAM, O'CONNOR & HENDERSON
Attorneys at Law
A Law Corporation

JAMES K. TAM 1485-0

ASHLEY K. IKEDA 2955-0

MITZI A. LEE 6059-0

Central Pacific Plaza, Suite 2000
220 South King Street
Honolulu, Hawaii 96813
Telephone No.: 545-3030

Attorneys for Lienors
HAWAII CARPENTERS TRUST FUNDS and
THE UNITED BROTHERHOOD OF CARPENTERS AND
JOINERS OF AMERICA, LOCAL 745, AFL-CIO

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

HAWAII CARPENTERS TRUST FUNDS (Health & Welfare Trust Fund by its Trustees, Albert Hamamoto, Gilbert Ancheta, Henry Iida, Albert Belliveau, Roy Iwamoto, Elmer Cabico, Thomas T. Uyetake, Keith Hirota, Tom Jackson, and Gordon S. Higa; Apprenticeship & Training Trust Fund by its Trustees, Conrad Murashige, Sidney Shimokawa, Richmond Keliikoa, David Rosa, Wayne Kawano, Glenn Shirota, Jim Ramirez,	M. L. NO. 93-0139 ORDER GRANTING BIRTCHER/BCI'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT ON LIENORS' APPLICATION FOR MECHANIC'S AND MATERIALMAN'S LIEN This Application Affects Land Designated by Oahu TMK No.: 9-4-7-54 HEARING DATE: March 15, 1994 TIME: 10:00 a.m. JUDGE: The Hon. Wilfred K. Watanabe

Mark Erwin, Toshito Isemoto, and Edward Cantere; Vacation & Holiday Trust Fund by its Trustees, John Murchison, Harry Murakami, Murray Bawden Mark Erwin, Gerard Sakamoto, Curtis Kern, Paul Sasaki, Keith Hirota, Allen Kusano, and James Mawae; Pension Trust Fund by its Trustees, George J. McCarthy, Dante Agra, Pepe D'Bayan, James Maeda, Raymond Nagata, Terence Nakamura, Jiggs Tamashiro, Theodore Hackbarth, Albert Yoshiyama, and Walter H. Kupau; Market Recovery Program by its Trustees, John Murchison, Walter H. Kupau, Larry Isemoto, Melvin Fujii, Allen Kusano, Theodore Hackbarth, Conrad Murashige, Warren Chong, Thalia Choy, and Brian Kawahara; and Financial Security Trust Fund by its Trustees, Bruce Patterson, Gary Heath, Gerard Sakamoto, Walter H. Kupau, Kenneth Sakurai, Robert Moyer, Gordon Scruton, Timothy McCormack, Albert Yoshiyama, and Ralph Yackly; and THE UNITED BROTHERHOOD OF CARPENTERS AND

JOINERS OF AMERICA, LOCAL 745, AFL-CIO,

Lienors,

vs.

WCC ASSOC., a Hawaii Limited Partnership,

Fee Owner,

and

BIRTCHER/BCI, aka BIRTCHER/BCI GENERAL CONTRACTORS, a Hawaii General Partnership,

General Contractor,

and

BCI GENERAL CONTRACTORS, a California corporation,

Co-General Contractor/Contractor,

and

JOHN DOES 1-100; JANE DOES 1-100; DOE CORPORATIONS 1-100; DOE PARTNERSHIPS 1-100 AND DOE ENTITIES 1-100,

Unidentified Parties,

ORDER GRANTING BIRTCHER/BCI'S MOTION TO DISMISS OR, IN THE ALTERNATIVE; FOR SUMMARY JUDGMENT ON LIENORS' APPLICATION FOR MECHANIC'S AND MATERIALMAN'S LIEN

On March 15, 1994 at 10:00 a.m., the motion of Birtcher/BCI to dismiss or, in the alternative, for summary judgment on lienor's application for mechanic's and materialman's lien filed by the Hawaii Carpenters Trust Funds and the United Brotherhood of Carpenters and Joiners of America, Local 745, AFL-CIO on November 1, 1993 came on for hearing before the Honorable Wilfred K. Watanabe. Thomas R. Sylvester appeared on behalf of Birtcher/BCI and WCC Associates and Ashley K. Ikeda appeared on behalf of the Hawaii Carpenter Trust Funds and the United Brotherhood of Carpenters and Joiners of America, Local 745, AFL-CIO.

The Court having reviewed the papers and pleadings filed in support of and in opposition to the motion, having heard the arguments of counsel, and for good cause shown does hereby grant Birtcher/BCI's motion solely on the basis that the Application for Mechanic's and Materialman's Lien and Demand for Payment filed herein is preempted by the Employee Retirement Income Security Act of 1974. (Birtcher/BCI's motion is denied on the basis that the Application for Mechanic's and Materialman's Lien and Demand for Payment is barred by the doctrine of collateral estoppel.)

NOW, THEREFORE, IT IS HEREBY ORDERED that Birtcher/BCI's Motion To Dismiss Or, In The Alternative, For Summary Judgment On Lienors' Application For Mechanic's And Materialman's Lien Filed By The Hawaii Carpenters Trust Funds On November 1, 1993 is granted on the basis that the Application For Mechanic's And Materialman's Lien and Demand For Payment is preempted by the Employee Retirement Income Security Act of 1974.

DATED: Honolulu, Hawaii, September 22, 1994

/s/ WILFRED K. WATANABE

FOR THE HONORABLE WENDELL K. HUDDY
JUDGE OF THE ABOVE-ENTITLED COURT

HAWAII CARPENTERS TRUST FUNDS AND THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 745, AFL-CIO vs. BCI GENERAL CONTRACTORS and WCC ASSOCIATES; M. L. No. 93-0139; Order Granting Birtcher/BCI's Motion To Dismiss Or, In The Alternative, For Summary Judgment On Lienors' Application For Mechanic's And Materialman's Lien

APPENDIX B

TAM, O'CONNOR & HENDERSON
Attorneys at Law
A Law Corporation

JAMES K. TAM 1485-0

ASHLEY K. IKEDA 2955-0

MITZI A. LEE 6059-0

Central Pacific Plaza, Suite 2000
220 South King Street
Honolulu, Hawaii 96813
Telephone No.: 545-3030

Attorneys for Lienors
HAWAII CARPENTERS TRUST FUNDS and
THE UNITED BROTHERHOOD OF CARPENTERS AND
JOINERS OF AMERICA, LOCAL 745, AFL-CIO

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

HAWAII CARPENTERS TRUST FUNDS (Health & Welfare Trust Fund by its Trustees, Albert Hamamoto, Gilbert Ancheta, Henry Iida, Albert Belliveau, Roy Iwamoto, Elmer Cabico, Thomas T. Uyetake, Keith Hirota, Tom Jackson, and Gordon S. Higa; Apprenticeship & Training Trust Fund by its Trustees, Conrad Murashige, Sidney Shimokawa, Richmond Keliikoa, David Rosa, Wayne Kawano, Glenn Shirota, Jim Ramirez,

M. L. NO. 93-0140

ORDER GRANTING BIRTCHER/BCI'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT ON LIENORS' APPLICATION FOR MECHANIC'S AND MATERIALMAN'S LIEN

This Application Affects Land Designated by Oahu TMK No.: 9-4-7-54

HEARING DATE: March 17, 1994
TIME: 10:00 a.m.
JUDGE: The Hon. Wilfred K. Watanabe

Mark Erwin, Toshito Isemoto, and Edward Cantere; Vacation & Holiday Trust Fund by its Trustees, John Murchison, Harry Murakami, Murray Bawden, Mark Erwin, Gerard Sakamoto, Curtis Kern, Paul Sasaki, Keith Hirota, Allen Kusano, and James Mawae; Pension Trust Fund by its Trustees, George J. McCarthy, Dante Agra, Pepe D'Bayan, James Maeda, Raymond Nagata, Terence Nakamura, Jiggs Tamashiro, Theodore Hackbarth, Albert Yoshiyama, and Walter H. Kupau; Market Recovery Program by its Trustees, John Murchison, Walter H. Kupau, Larry Isemoto, Melvin Fujii, Allen Kusano, Theodore Hackbarth, Conrad Murashige, Warren Chong, Thalia Choy, and Brian Kawahara; and Financial Security Trust Fund by its Trustees, Bruce Patterson, Gary Heath, Gerard Sakamoto, Walter H. Kupau, Kenneth Sakurai, Robert Moyer, Gordon Scruton, Timothy McCormack, Albert Yoshiyama, and Ralph Yackly); and THE UNITED BROTHERHOOD OF CARPENTERS AND

JOINERS OF AMERICA, LOCAL 745, AFL-CIO,

Lienors,

vs.

WCC ASSOCIATES, a Hawaii Limited Partnership,

Fee Owner,

and

BIRTCHER/BCI, aka BIRTCHER/BCI GENERAL CONTRACTORS, a Hawaii General Partnership,

General Contractor,

and

BCI GENERAL CONTRACTORS, a California corporation,

Co-General Contractor/Contractor,

and

YOST ENTERPRISES, INC., aka YOST GYPSUM, an Arizona corporation,

Subcontractor,

and

JOHN DOES 1-100; JANE DOES 1-100; DOE CORPORATIONS 1-100; DOE PARTNERSHIPS 1-100 AND DOE ENTITIES 1-100,

Unidentified Parties,

ORDER GRANTING BIRTCHER/BCI'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT ON LIENORS' APPLICATION FOR MECHANIC'S AND MATERIALMAN'S LIEN

On March 17, 1994 at 10:00 a.m., the motion of Birtcher/BCI to dismiss or, in the alternative, for summary judgment on lienor's application for mechanic's and materialman's lien filed by the Hawaii Carpenters Trust Funds and the United Brotherhood of Carpenters and Joiners of America, Local 745, AFL-CIO on November 1, 1993 came on for hearing before the Honorable Wilfred K. Watanabe. Thomas R. Sylvester appeared on behalf of Birtcher/BCI and WCC Associates and Ashley K. Ikeda appeared on behalf of the Hawaii Carpenter Trust Funds and the United Brotherhood of Carpenters and Joiners of America, Local 745, AFL-CIO.

The Court having reviewed the papers and pleadings filed in support of and in opposition to the motion, having heard the arguments of counsel, and for good cause shown does hereby grant Birtcher/BCI's motion solely on the basis that the Application for Mechanic's and Materialman's Lien and Demand for Payment filed herein is preempted by the Employee Retirement Income Security Act of 1974. (Birtcher/BCI's motion is denied on the basis that the Application for Mechanic's and Materialman's Lien and Demand for Payment is barred by the doctrine of collateral estoppel.)

NOW, THEREFORE, IT IS HEREBY ORDERED that Birtcher/BCI's Motion To Dismiss Or, In The Alternative, For Summary Judgment On Lienors' Application For Mechanic's And Materialman's Lien Filed By The Hawaii Carpenters Trust Funds On November 1, 1993 is granted on the basis that the Application For Mechanic's And Materialman's Lien And Demand For Payment is preempted by the Employee Retirement Income Security Act of 1974.

DATED: Honolulu, Hawaii, September 22, 1994

/s/ WILFRED K. WATANABE

FOR THE HONORABLE WENDELL K. HUDDY
JUDGE OF THE ABOVE-ENTITLED COURT

HAWAII CARPENTERS TRUST FUNDS AND THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 745, AFL-CIO vs. BCI GENERAL CONTRACTORS and WCC ASSOCIATES; M. L. No. 93-0140; Order Granting Birtcher/BCI's Motion To Dismiss Or, In The Alternative, For Summary Judgment On Lienors' Application For Mechanic's And Materialman's Lien

APPENDIX C

TAM, O'CONNOR & HENDERSON
Attorneys at Law
A Law Corporation

JAMES K. TAM 1485-0

ASHLEY K. IKEDA 2955-0

MITZI A. LEE 6059-0

Central Pacific Plaza, Suite 2000
220 South King Street
Honolulu, Hawaii 96813
Telephone No.: 545-3030

Attorneys for Lienors
HAWAII CARPENTERS TRUST FUNDS and
THE UNITED BROTHERHOOD OF CARPENTERS AND
JOINERS OF AMERICA, LOCAL 745, AFL-CIO

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

HAWAII CARPENTERS TRUST FUNDS (Health & Welfare Trust Fund by its Trustees, Albert Hamamoto, Gilbert Ancheta, Henry Iida, Albert Belliveau, Roy Iwamoto, Elmer Cabico, Thomas T. Uyetake, Keith Hirota, Tom Jackson, and Gordon S. Higa; Apprenticeship & Training Trust Fund by its Trustees, Conrad Murashige, Sidney Shimokawa, Richmond Keliikoa, David Rosa, Wayne Kawano, Glenn Shirota, Jim Ramirez, Mark Erwin, Toshito Isemoto, and Edward Cantere; Vacation & Holiday Trust Fund by its Trustees, John Murchison, Harry Murakami,	M. L. NO. 93-0139 JUDGMENT DISMISSING LIEN APPLICATION

Murray Bawden, Mark Erwin, Gerard Sakamoto, Curtis Kern, Paul Sasaki, Keith Hirota, Allen Kusano, and James Mawae; Pension Trust Fund by its Trustees, George J. McCarthy, Dante Agra, Pepe D'Bayan, James Maeda, Raymond Nagata, Terence Nakamura, Jiggs Tamashiro, Theodore Hackbarth, Albert Yoshiyama, and Walter H. Kupau; Market Recovery Program by its Trustees, John Murchison, Walter H. Kupau, Larry Isemoto, Melvin Fujii, Allen Kusano, Theodore Hackbarth, Conrad Murashige, Warren Chong, Thalia Choy, and Brian Kawahara; and Financial Security Trust Fund by its Trustees, Bruce Patterson, Gary Heath, Gerard Sakamoto, Walter H. Kupau, Kenneth Sakurai, Robert Moyer, Gordon Scruton, Timothy McCormack, Albert Yoshiyama, and Ralph Yackly; and THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 745, AFL-CIO,

Lienors,

vs.

WCC ASSOC., a Hawaii Limited Partnership,

Fee Owner,

and

BIRTCHER/BCI, aka BIRTCHER/BCI GENERAL CONTRACTORS, a Hawaii General Partnership,

General Contractor,

and

BCI GENERAL CONTRACTORS, a California corporation,

Co-General Contractor/Contractor,

and

JOHN DOES 1-100; JANE DOES 1-100; DOE CORPORATIONS 1-100; DOE PARTNERSHIPS 1-100 AND DOE ENTITIES 1-100,

Unidentified Parties,

JUDGMENT DISMISSING LIEN APPLICATION

WHEREAS ON November 1, 1993, Lienors Hawaii Carpenters Trust Funds and the United Brotherhood of Carpenters And Joiners Of America, Local 745, AFL-CIO, filed an Application For Mechanic's And Materialman's Lien And Demand For Payment; Notice Of Mechanic's And Materialman's Lien And Demand For Payment; Exhibits "A" and "B"; Affidavit Of Paul Marx; Affidavit Of Walter H. Kupau; Notice Of Hearing Of Application For Mechanic's And Materialman's Lien And Demand For Payment; Order Of Service;

WHEREAS ON February 28, 1994, Respondent Birtcher/BCI General Contractors filed a Motion To Dismiss Or, In The Alternative, For Summary Judgment On Lienor's Application For Mechanic's And Materialman's Lien Filed By The Hawaii Carpenters Trust Funds On November 1, 1993; Memorandum In Support Of Motion; Affidavit Of Counsel; Exhibits "A-F"; Notice Of Hearing Of Motion And Certificate Of Service, which was subsequently joined by Respondent WCC Associates. Said Motion came on for hearing before the Honorable Wilfred K. Watanabe on March 15, 1994, wherein Judge Watanabe granted said Motion. Thereafter, an Order Granting Birtcher/BCI's Motion To Dismiss Or, In The Alternative, For Summary Judgment On Lienor's Application For Mechanic's And Materialman's Lien was filed herein on September 23, 1994.

IT IS HEREBY ORDER, ADJUDGED AND DECREED THAT:

1. Judgment is entered in favor of Respondents Birtcher/BCI General Contractors and WCC Associates and against Lienors Hawaii Carpenters Trust Funds and The United Brotherhood Of Carpenters And Joiner Of America, Local 745, AFL-CIO.

2. Lienors Hawaii Carpenters Trust Funds and The United Brotherhood Of Carpenters And Joiners Of America, Local 745, AFL-CIO's Application For Mechanic's And Materialman's Lien And Demand For Payment filed herein on November 1, 1993 is hereby dismissed as to all parties to this proceeding.

3. Accordingly, there are no remaining claims, issues, and/or parties to this proceeding.

DATED: Honolulu, Hawaii, October 12, 1994

/s/ WENDELL K. HUDDY

JUDGE OF THE ABOVE-ENTITLED COURT

APPROVED AS TO FORM:

/s/

THOMAS R. SYLVESTER, ESQ
Attorney for Respondents
BIRTCHER/BCI GENERAL CONTRACTORS
and WCC ASSOCIATES

APPENDIX D

TAM, O'CONNOR & HENDERSON
Attorneys at Law
A Law Corporation

JAMES K. TAM 1485-0

ASHLEY K. IKEDA 2955-0

MITZI A. LEE 6059-0

Central Pacific Plaza, Suite 2000
220 South King Street
Honolulu, Hawaii 96813
Telephone No.: 545-3030

Attorneys for Lienors
HAWAII CARPENTERS TRUST FUNDS and
THE UNITED BROTHERHOOD OF CARPENTERS AND
JOINERS OF AMERICA, LOCAL 745, AFL-CIO

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

HAWAII CARPENTERS TRUST FUNDS (Health & Welfare Trust Fund by its Trustees, Albert Hamamoto, Gilbert Ancheta, Henry Iida, Albert Belliveau, Roy Iwamoto, Elmer Cabico, Thomas T. Uyetake, Keith Hirota, Tom Jackson, and Gordon S. Higa; Apprenticeship & Training Trust Fund by its Trustees, Conrad Murashige, Sidney Shimokawa, Richmond Keliikoa, David Rosa, Wayne Kawano, Glenn Shirota, Jim Ramirez, Mark Erwin, Toshito Isemoto, and Edward Cantere; Vacation & Holiday Trust Fund by its Trustees, John Murchison, Harry Murakami,	M. L. NO. 93-0140 JUDGMENT DISMISSING LIEN APPLICATION

Murray Bawden, Mark Erwin, Gerard Sakamoto, Curtis Kern, Paul Sasaki, Keith Hirota, Allen Kusano, and James Mawae; Pension Trust Fund by its Trustees, George J. McCarthy, Dante Agra, Pepe D'Bayan, James Maeda, Raymond Nagata, Terence Nakamura, Jiggs Tamashiro, Theodore Hackbarth, Albert Yoshiyama, and Walter H. Kupau; Market Recovery Program by its Trustees, John Murchison, Walter H. Kupau, Larry Isemoto, Melvin Fujii, Allen Kusano, Theodore Hackbarth, Conrad Murashige, Warren Chong, Thalia Choy, and Brian Kawahara; and Financial Security Trust Fund by its Trustees, Bruce Patterson, Gary Heath, Gerard Sakamoto, Walter H. Kupau, Kenneth Sakurai, Robert Moyer, Gordon Scruton, Timothy McCormack, Albert Yoshiyama, and Ralph Yackly); and THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 745, AFL-CIO,

Lienors,

vs.

WCC ASSOCIATES, a Hawaii Limited Partnership,

Fee Owner,

and

BIRTCHER/BCI, aka BIRTCHER/BCI GENERAL CONTRACTORS, a Hawaii General Partnership,

General Contractor,

and

BCI GENERAL CONTRACTORS, a California corporation,

Co-General Contractor/Contractor,

and

YOST ENTERPRISES, INC., aka YOST GYPSUM, an Arizona corporation,

Subcontractor

and

JOHN DOES 1-100; JANE DOES 1-100; DOE CORPORATIONS 1-100; DOE PARTNERSHIPS 1-100 AND DOE ENTITIES 1-100,

Unidentified Parties,

JUDGMENT DISMISSING LIEN APPLICATION

WHEREAS ON November 1, 1993, Lienors Hawaii Carpenters Trust Funds and The United Brotherhood of Carpenters And Joiners Of America, Local 745, AFL-CIO, filed an Application For Mechanic's And Materialman's Lien And Demand For Payment; Notice Of Mechanic's And Materialman's Lien And Demand For Payment; Exhibits "A" and "B"; Affidavit Of Paul Marx; Affidavit Of Walter H. Kupau; Notice Of Hearing Of Application For Mechanic's And Materialman's Lien And Demand For Payment; Order Of Service;

WHEREAS ON February 28, 1994, Respondent Birtcher/BCI General Contractors filed a Motion To Dismiss Or, In The Alternative, For Summary Judgment On Lienor's Application For Mechanic's And Materialman's Lien Filed By The Hawaii Carpenters Trust Funds On November 1, 1993; Memorandum In Support Of Motion; Affidavit Of Counsel; Exhibits "A-F"; Notice Of Hearing Of Motion And Certificate Of Service, which was subsequently joined by Respondent WCC Associates. Said Motion came on for hearing before the honorable Wilfred K. Watanabe on March 17, 1994, wherein Judge Watanabe granted said Motion. Thereafter, an Order Granting Birtcher/BCI's Motion To Dismiss Or, In The Alternative, For Summary Judgment On Lienor's Application For Mechanic's And Materialman's Lien was filed herein on September 23, 1994.

IT IS HEREBY ORDER, ADJUDGED AND DECREED THAT:

1. Judgment is entered in favor of Respondents Birtcher/BCI General Contractors and WCC Associates and against Lienors Hawaii Carpenters Trust Funds and The United Brotherhood Of Carpenters And Joiner Of America, Local 745, AFL-CIO.

2. Lienors Hawaii Carpenters Trust Funds and The United Brotherhood Of Carpenters And Joiner Of America, Local 745, AFL-CIO's Application For Mechanic's And Materialman's Lien And Demand For Payment filed herein on November 1, 1993 is hereby dismissed as to all parties to this proceeding.

3. Accordingly, there are no remaining claims, issues, and/or parties to this proceeding.

DATED: Honolulu, Hawaii, October 12, 1994

/s/ WENDELL K. HUDDY

JUDGE OF THE ABOVE-ENTITLED COURT

APPROVED AS TO FORM:

/s/

THOMAS R. SYLVESTER, ESQ
Attorney for Respondents
BIRTCHER/BCI GENERAL CONTRACTORS
and WCC ASSOCIATES

3

Supreme Court, U.S.
FILED
NOV 28 1997
CLERK

No. 96-1651

In The

Supreme Court of the United States

October Term, 1996

WCC ASSOCIATES, BIRTCHER/BCI,

Petitioners,

v.

HAWAII CARPENTERS TRUST FUNDS; UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 745, AFL-CIO,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Hawaii

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

LISSA H. ANDREWS (Counsel of Record)
WESLEY H. IKEDA
TAM, O'CONNOR & HENDERSON
220 South King Street, 20th Floor
Honolulu, Hawaii 96813
(808) 545-3030

October 1996

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

30 pp

QUESTION PRESENTED

Whether the Employment Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1144(a), preempts the use of a state mechanic's lien statute of general applicability to recover delinquent trust fund contributions?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 5

SUMMARY OF THE ARGUMENT 5

ARGUMENT 6

I. THE DECISION OF THE HAWAII SUPREME COURT DOES NOT CONFLICT WITH EXISTING ERISA DECISIONS 6

II. THE DECISION OF THE HAWAII SUPREME COURT IS NOT ERRONEOUS 13

A. The Hawaii Supreme Court Correctly Applied The Precedents Of This Court And The Legislative Intent And Policy Objectives Of ERISA 13

B. The Reference To ERISA In The Trust Funds' Applications For Mechanic's Liens Does Not Require Preemption 16

III. THE DECISION OF THE HAWAII SUPREME COURT PRESENTS NO CIRCUIT CONFLICT .. 17

CONCLUSION 20

TABLE OF AUTHORITIES

Page

CASES

California Division of Labor Standards Enforcement v. Dillingham Construction, N.A., Inc., ___ U.S. ___, 117 S.Ct. 832, 136 L.Ed.2d 791 (1997) 6, 9, 10

Camp Newfound/Owatonna, Inc. v. Town of Harrison, Maine, 1997 WL 255351 (U.S.) (May 19, 1997) ..10, 12

Dillingham Construction N.A., Inc., v. County of Sonoma, 57 F.3d 712 (9th Cir. 1995), *cert. granted*, 116 S.Ct. 1145, 134 L.Ed.2d 541 (1996) 9

District of Columbia v. Greater Washington Bd. of Trade, 506 U.S. 125 (1992)..... 7, 12, 14

Ernst & Ernst v. Hochfielder, 425 U.S. 185, *reh'g denied*, 425 U.S. 986 (1976)..... 5

Gee v. Southwest Airlines, 110 F.3d 1400 (9th Cir. 1997)..... 17

Hawai'i Carpenters' Trust Funds v. Aloe Development Corp., 63 Haw. 566, 633 P.2d 1106 (1981)..... 2, 16

Hawaii Laborers' Trust Funds v. Maui Prince Hotel, 81 Haw. 487, 918 P.2d 1143 (Haw. 1996)...5, 6, 13, 14

Ingersoll-Rand Co. v. McClendon, 498 U.S. 133 (1990)..... 7, 19

Iron Workers Mid-South Pension Fund v. Terotechnology Corp., 891 F.2d 548 (5th Cir. 1990) 17, 18

Mackey v. Lanier Collection Agency & Service, Inc., 486 U.S. 825 (1988)..... 12, 13, 14

TABLE OF AUTHORITIES – Continued

Page

McCoy v. Massachusetts Institute of Technology, 950 F.2d 13 (1st Cir. 1991) 17, 18

New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 115 S.Ct. 1671, 131 L.Ed.2d 695 (1995) 6, 7, 18, 19

Plumber's Local 458 Holiday Vacation Fund v. Howard Immel, Inc., 151 Wis.2d 233, 445 N.W.2d 43 (Wis.Ct.App. 1989) 14

Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983) .. 7, 8, 9

Tennessee v Dunlap, 426 U.S. 312 (1976) 5

Trustees of the Electrical Workers Health and Welfare Trust v. Marjo Corporation, 988 F.2d 865 (9th Cir. 1993) 17, 18

STATUTES

29 U.S.C. § 1104(a)(1) 11

29 U.S.C. § 1132(g) 16

29 U.S.C. § 1132(g)(2) 16

29 U.S.C. § 1144(a) 2, 5, 6, 14

29 U.S.C. § 1145 ..... 10, 11, 16

Hawaii Revised Statutes ("HRS") § 507-41, *et seq.* 1

§ 507-42 16

Staff of Senate Comm. on Labor and Human Resources, 96th Cong., 2d Sess., S.1076, The Multiemployer Pension Plan Amendments of 1980: Summary and Analysis of Consideration (Comm.Print 1980) 11

Sup.Ct.R.15.2 ..... 4, 16

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The monies Respondents Hawaii Carpenters Trust Funds and the United Brotherhood of Carpenters & Joiners of America, Local 745, AFL-CIO (hereinafter collectively referred to as the "Trust Funds") are attempting to recover in these proceedings arose out of collective bargaining agreements (hereinafter referred to as "CBAs") signed by Yost Enterprises, Inc., an Arizona corporation (hereinafter referred to as "Yost"), and BCI General Contractors, a California corporation (hereinafter referred to as "BCI"), with the United Brotherhood of Carpenters & Joiners of America, Local 745, AFL-CIO. The terms of the CBAs required Yost and BCI to contribute employee benefit plan trust fund contributions to the respective benefit plans making up the Hawaii Carpenters Trust Funds. Both Yost and BCI were subcontractors on the Waikele Power Center construction project undertaken by WCC Associates, the fee owner.

Both Yost and BCI defaulted in their respective trust fund contribution obligations to the Trust Funds which resulted in the Trust Funds taking legal action to recover these monies due. Among the proceedings instituted by the Trust Funds were applications for mechanic's and materialmen's liens (hereinafter referred to as "lien applications") both filed with the Circuit Court of the First Circuit, State of Hawaii, on November 11, 1993, pursuant to § 507-41, *et seq.*, Hawaii Revised Statutes. These lien applications were designated by the court as M.L. No. 93-0139, in connection with the delinquency incurred by

BCI, and M.L. No. 93-0140, in connection with the delinquency incurred by Yost. Before the lien actions could come up for a probable cause hearing as to whether the lien should attach, Petitioner, Birtcher/BCI, one of the respondents in the lien action, filed motions to dismiss or in the alternative, for summary judgment in both lien applications on February 28, 1994. Petitioner WCC Associates joined in the motions. The State Circuit Court dismissed both lien applications based upon the contention that the lien applications were preempted by the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1144(a). See Petitioners' Supplemental Appendix to Petition for Writ of Certiorari (hereinafter "Pet.Supp.App."), A – D. Appeals to the Hawaii Supreme Court were taken from the judgments dismissing both lien applications.

On September 10, 1996, the Hawaii Supreme Court issued an order of summary disposition, vacating the dismissals of the lien applications in Hawaii Supreme Court Docket Nos. 18489 and 18519 and remanding both actions for further proceedings consistent with its decision in *Hawai'i Laborers Trust Fund v. Maui Prince Hotel*, 81 Haw. 487, 918 P.2d 1143 (1996). See Petitioners' Appendix (hereinafter "Pet.App."), 1a-3a.[1] On October 10, 1996,

---

[1] Pursuant to Rule 35 of the Hawaii Rules of Appellate Procedure, dispositional orders of the Hawaii Supreme Court shall not be published except upon order of the Court. An unpublished dispositional order does not have precedential effect except when the order establishes law of the pending case, res judicata, or collateral estoppel. Summary Disposition Order No. 96-13 was not designated by the Court for publication. *See* 925 P.2d 375.

judgments on appeal were entered in the Hawaii Supreme Court. Petitioners filed this Petition on January 8, 1997. The Hawaii Supreme Court, however, did not rule on certain objections made to Petitioners' attempted introduction of unauthenticated evidence such as the copy of a CBA which Petitioners' counsel attempted to qualify by the use of counsel's own incompetent affidavit alleging insufficient facts. The CBA and associated arguments put forth by Petitioners relying upon the terms of the CBA should thus be struck from the record below.

The question presented by Petitioners is whether ERISA preempts the use of Hawaii's lien application statute *"where there is no pre-existing judgment* and where liability to make those contributions is dependent on interpretation of ERISA provisions related to a collective bargaining agreement". See Petition (hereinafter "Pet."), p. ii (emphasis added). The Trust Funds object to the question presented, with regard to whether the Trust Funds were in possession of a judgment at the time the lien applications were filed. Petitioners did not argue before the Hawaii Supreme Court that ERISA preemption was warranted because no judgments were taken against Yost and BCI at the time the lien applications were filed in the Hawaii Supreme Court.[2] This issue was not before

---

[2] If recovery of a judgment is somehow relevant, the deadline to recover a judgment against the debtor/employer ought to be the time the probable cause hearing begins, at the very earliest. Lien applications under the Hawaii mechanic's and materialman's lien law must be filed within 45 days of the filing of an affidavit showing publication of a notice of completion of contract. A probable cause hearing can be scheduled a year after the filing of the lien application if the

the Hawaii Supreme Court and is not properly before this Court if certiorari is granted. Sup.Ct.R.15.2. Trust Funds accordingly object to consideration of the question presented with regard to whether or not judgments were obtained in the proceedings below. Further, Petitioners failed to submit any admissible evidence in the State Circuit Court regarding the existence or non-existence of a judgment. If Petitioners had properly raised this issue in the Court below, Trust Funds could have taken steps to deal with the issue and the record below.[3] Therefore, this Court is presented with an incomplete record and cannot make a determination as to the question presented. To the extent this Court determines that resolution of the fact issues relative to the effect of the judgments on this case are necessary, this is an additional reason why certiorari should not be granted in this case. Petitioners did not

---

matter is contested. *See* § 507-43(b), Hawaii Revised Statutes (Appendix A, p. 3).

[3] The fact is that the Trust Funds are in possession of judgments against BCI and Yost. Therefore, since judgments were taken against both BCI and Yost, a judgment will exist at the time the Trust Funds commence enforcement of the lien application with the holding of a probable cause hearing under the Hawaii lien law. Although these judgments are not in the record below, Trust Funds bring these facts to the Court's attention in view of Petitioners' phrasing of the question presented to improperly include matters they did not show proof of and preserve in the State courts below. In any event, the issue of whether or not the Trust Funds were in possession of judgments at the time the lien applications were filed has been waived by Petitioners and is not before this Court for consideration. The record below is without any admissible evidence to prove to the Hawaii Supreme Court that a judgment was not entered against either BCI or Yost.

properly raise or preserve this question before the Hawaii Circuit Court and the Hawaii Supreme Court and this Court cannot consider a question based on facts and arguments that were not presented in the proceedings below. *See Ernst & Ernst v. Hochfielder*, 425 U.S. 185, 194 n.13, *reh'g denied* 425 U.S. 986 (1976); *Tennessee v. Dunlap*, 426 U.S. 312, 314 n.2 (1976).

REASONS FOR DENYING THE WRIT

SUMMARY OF THE ARGUMENT

The question presented by this case is whether ERISA, 29 U.S.C. § 1144(a) preempts the use of Hawaii's Mechanic's and Materialman's Lien Law, Hawaii Revised Statutes ("HRS") § 507-42, to recover delinquent trust fund contributions. Hawaii's mechanic's lien statute is a law of general applicability which provides a general collection mechanism for all laborers and materialmen within the State to collect on amounts due and owing to the laborer or materialman for improvements made to real property. (*See* Appendix A, p. 1).

Petitioners contend that the mechanic's lien law is preempted by ERISA's preemption provision, § 514(a), 29 U.S.C. § 1144(a). The preemption clause provides, in relevant part, that ERISA " . . . shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan. . . . "

Petitioners contend that the State mechanic's lien law relates to an employee benefit plan and therefore the Hawaii Supreme Court erred in its holding in *Hawaii Laborers' Trust Funds v. Maui Prince Hotel*, 81 Haw. 487, 918

P.2d 1143 (Haw. 1996). As will be discussed below, Petitioners are incorrect in their interpretation and application of § 1144(a) to the state law in this case. Specifically, Petitioners do not take into account the legislative history behind the statute, the two most recent opinions of this Court on ERISA preemption,[4] nor do Petitioners address the decisions of this Court which address ERISA preemption of state laws which merely provide a general judgment collection mechanism.

Further, Petitioners' contention that the *Maui Prince Hotel* decision is in conflict with three different federal circuit courts of appeals decisions, is unfounded. The federal decisions were based on factually inapposite lien statutes and were decided prior to the more recent opinions of this Court, raising questions as to the continued viability of these opinions.

ARGUMENT

I. THE DECISION OF THE HAWAII SUPREME COURT DOES NOT CONFLICT WITH EXISTING ERISA DECISIONS

Petitioners contend that the Hawaii Supreme Court's decision in *Maui Prince Hotel* is erroneous because the Court disregarded the breadth of ERISA's preemption

[4] *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 115 S.Ct. 1671, 131 L.Ed.2d 695 (1995); *California Division of Labor Standards Enforcement v. Dillingham Construction, N.A., Inc.*, ___ U.S. ___, 117 S.Ct. 832, 136 L.Ed.2d 791 (1997). At the time of the submittal of the Petition, this Court had not yet decided the *Dillingham* case.

clause in holding that the mechanic's lien statute did not "relate to" or conflict with an ERISA plan. Specifically, Petitioners claim that the Hawaii Supreme Court's decision is contrary to the holdings of this Court that ERISA's preemption clause is "conspicuous for its breadth," and that the term "relates to" is to be broadly construed. Pet. 11-14. Contrary to the Petitioners' contentions, the *Maui Prince Hotel* decision appropriately applied the legislative history and decisions of this Court in determining that Hawaii's mechanic's lien statute was not ERISA preempted.

In *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 115 S.Ct. 1671, 131 L.Ed.2d 695 (1995), a New York statute required hospitals to surcharge patients covered by certain commercial health insurance plans governed by ERISA. The District Court determined that the New York statute triggered ERISA preemption by virtue of the economic burden the statute would have on certain commercial health insurance carriers, thus meeting the "related to" test of § 1144(a). 115 S.Ct. at 1675. The Court of Appeals for the Second Circuit affirmed, relying on the broad interpretation of "relate to" by this Court in *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983), *District of Columbia v. Greater Washington Board of Trade*, 506 U.S. 125 (1992), and *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990). 115 S.Ct. at 1676.

In deciding that no ERISA preemption existed, this Court discussed the problems with its interpretation of the words "relate to" in its previous decisions. The Court stated that claims of preemption must first be addressed with the "starting presumption that Congress does not

intend to supplant state law." 115 S.Ct. at 1676 (citing *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981)). "Indeed, in cases like this one, where federal law is said to bar state action in fields of traditional state regulation, . . . , we have worked on the 'assumption that the historic police powers of the States were not to be superseded by the Federal Act *unless that was the clear and manifest purpose of Congress.*' " (emphasis added) (citations omitted) 115 S.Ct. at 1676. The Court then looked to Congress' intent and the text of the provision in question. The Court stated:

> The governing text of ERISA is clearly expansive. Section 514(a) marks for pre-emption 'all state laws insofar as they . . . relate to any employee benefit plan' covered by ERISA, and one might be excused for wondering, at first blush, whether the words of limitation ('insofar as they . . . relate') do much limiting. *If 'relate to' were taken to extend to the furthest stretch of its indeterminacy, then for all practical purposes pre-emption would never run its course, for '[r]eally, universally, relations stop nowhere,' H. James, Roderick Hudson xli (New York ed., World's Classics 1980). But that, of course, would be to read Congress's words of limitation as mere sham, and to read the presumption against pre-emption out of the law whenever Congress speaks to the matter with generality. That said, we have to recognize that our prior attempt to construe the phrase 'relate to' does not give us much help drawing the line here.*

115 S.Ct. at 1677 (emphasis added). The Court then noted that in *Shaw, supra*, it explained that a law relates to an ERISA plan "if it has a connection with or reference to such a plan," but that the term "connection with" was not

any more helpful in construing "relate to." *Id.* at 1677 (citing *Shaw*, 463 U.S. at 97). The Court stated:

> For the same reasons that infinite relations cannot be the measure of pre-emption, neither can infinite connections. We simply must go beyond the unhelpful test and the frustrating difficulty of defining its key term, *and look instead to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive.*

115 S.Ct. at 1677 (emphasis added).

The most recent decision of this Court concerning ERISA preemption is *California Division of Labor Standards Enforcement v. Dillingham Construction, N.A., Inc.*, ___ U.S. ___, 117 S.Ct. 832, 136 L.Ed.2d 791 (1997).[5] In *Dillingham*, this Court summed up its ERISA decisions as follows:

> . . . Where a State's law acts immediately and exclusively upon ERISA plans, as in Mackey, or where the existence of ERISA plans is essential to the law's operation, as in Greater Washington Bd. of Trade and Ingersoll-Rand, that 'reference' will result in pre-emption.
>
> A law that does not refer to ERISA plans may yet be pre-empted if it has a 'connection with' ERISA plans. Two Terms ago, we recognized that an 'uncritical liberalism' in applying

---

[5] This case is cited by Petitioners as support for their position. At the time of the submittal of the Petition, certiorari had been granted by this Court to review the decision of the Ninth Circuit Court of Appeals that California's prevailing wage law "related to" and was preempted by ERISA. *Dillingham Construction N.A., Inc., v. County of Sonoma*, 57 F.3d 712 (9th Cir. 1995), *cert. granted*, 116 S.Ct. 1145, 134 L.Ed.2d 541 (1996). Pet. 13.

> this standard offered scant utility in determining Congress' intent as to the extent of § 514(a)'s reach. Travelers, 514 U.S., at ___ (slip op., at 9). Rather, to determine whether a state law has the forbidden connection, we look both to 'the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive,' ibid., as well as to the nature of the effect of the state law on ERISA plans, id., at ___ (slip op. at 12).

117 S.Ct. at 838. This Court then held that California's prevailing wage statute which altered the incentives, but did not dictate the choices facing ERISA plans was "no different from myriad state laws in areas traditionally subject to local regulation, which Congress could not possibly have intended to eliminate." *Id.* at 842.

The principles of ordinary field pre-emption and ordinary conflict pre-emption provide the standards by which this court should judge whether the Hawaii lien law is preempted. *Id.* at 843 (Scalia, J., Ginsburg, J. concurring). This position also appears to be the position of Justice Thomas. *Camp Newfound/Owatonna, Inc. v. Town of Harrison, Maine,* 1997 WL 255351 (U.S.) (May 19, 1997) p. 30, 31 (Thomas, J. dissenting). Being that 29 U.S.C. § 1145 does not provide "extensive legislation" which preempts the field of delinquent trust fund contribution collections, Hawaii's lien law cannot be characterized as being preempted by ERISA.

The objectives of the ERISA statute are well documented with respect to collection of delinquent trust fund contributions. Under ERISA, the trustees are empowered

to administer the various employee benefit plans and to see to the financial stability of the funds in order to protect the beneficiaries and plan participants. 29 U.S.C. § 1104(a)(1). By enacting the Multiemployer Pension Plan Amendments Act of 1980 (hereinafter "MPPAA"), which inserted 29 U.S.C. § 1145 (ERISA § 515), into the law, the aim of Congress was to deal with the problems caused by employer delinquencies in multiemployer benefit plans, to promote prompt payment of contributions, and to assist plans in recovering the costs incurred in connection with delinquencies. Staff of Senate Comm. on Labor and Human Resources, 96th Cong., 2d Sess., S.1076, The Multiemployer Pension Plan Amendments of 1980: Summary and Analysis of Consideration (Comm.Print 1980) at 43-44. Congress never intended to prevent a plan from benefiting from utilization of a state's mechanic's lien law which does not act immediately and exclusively upon ERISA plans and where the existence of an ERISA plan is not essential to the law's operation. As stated expressly in the legislative history: "The Committee amendment does not change any other type of remedy permitted under State or Federal law with respect to delinquent multiemployer plan contributions." H.R.Rep.No. 869, 96th Cong., 2d Sess. (1980) Part II at 48-49, 4 U.S. Code-Congressional and Administrative News, 96th Cong. 2d Sess. at p. 3038. Thus, Congress has not been silent on the issue of preemption of state law utilized by employee benefit plans to recover delinquent trust fund contributions. Even if Congress had been silent on this issue, this Court's "preemption jurisprudence explicitly rejects the notion that mere congressional silence on a particular

issue may be read as preempting state law." *Camp Newfound/Owatonna, Inc. v. Town of Harrison, Maine*, 1997 WL 255351 (U.S.) (May 19, 1997) p. 30, 31 (Thomas, J. dissenting).

This Court addressed the issue of congressional intent with regard to the collection of delinquent plan contributions in *Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825 (1988). In *Mackey*, petitioners (the plan trustees) contended that the Georgia garnishment procedure which was used by a creditor of a participant to garnish funds held by an employee welfare benefit plan was pre-empted by ERISA. Like the Hawaii mechanic's lien statute, Georgia's general garnishment statute did not single out or specifically mention ERISA plans. The plan trustees argued that garnishment would impose additional administrative burdens and costs upon benefit plans and its trustees, and therefore the Georgia garnishment statute "relate[d] to" an ERISA plan. This Court disagreed and held that ERISA did not bar the garnishment action:

> . . . In our view, . . . , certain ERISA provisions, and several aspects of the statute's structure, indicate that Congress did not intend to forbid the use of state-law mechanisms of executing judgments against ERISA welfare benefit plans, even when those mechanisms prevent plan participants from receiving their benefits.

486 U.S. at 831-32. *See also District of Columbia v. Greater Washington Bd. of Trade*, 506 U.S. 125 (1992) ("[p]re-emption does not occur, however, if the state law has only a 'tenuous, remote, or peripheral' connection with covered plans, . . . , as is the case with many laws of general

applicability. . . . ") 506 U.S. at 130 fn. 1 (citations omitted).

The Hawaii mechanic's lien statute, like the Georgia general garnishment statute, is a law of general applicability which does not "relate to" or have a connection with an ERISA plan. Moreover, in the present case, Hawaii's mechanic's lien statute allows the plans to collect delinquent contributions and does not impose hardships or burdens on the plan, as argued by the plan trustees in *Mackey*, and does not take funds out of the plan as in *Mackey*. The Congressional objectives and intent behind the ERISA statute are served by the Hawaii statute which actually aids the plans in collecting delinquent contributions.

II. THE DECISION OF THE HAWAII SUPREME COURT IS NOT ERRONEOUS

A. The Hawaii Supreme Court Correctly Applied The Precedents Of This Court And The Legislative Intent And Policy Objectives Of ERISA

The Hawaii Supreme Court held in *Maui Prince Hotel* that ERISA did not preempt the use of Hawaii's mechanic's lien statute as an enforcement mechanism for the collection of delinquent trust fund contributions. In that case, the Hawaii Laborers' Trust Funds ("HLTF") obtained judgments against a subcontractor for delinquent trust fund contributions in the United States District Court for the District of Hawaii. HLTF then filed an action in the Hawaii state court to enforce the judgments under the Hawaii mechanic's lien statute.

The Hawaii Supreme Court correctly applied the precedents of this Court to determine that Hawaii's mechanic's lien law did not "relate to" an employee benefit plan and was not expressly preempted by § 1144(a). Specifically, the Court found that under *Greater Washington* and *Mackey, supra,* a state law of general applicability like Hawaii's mechanic's lien statute is not expressly preempted by ERISA. 918 P.2d at 1152. The Hawaii Supreme Court, as an additional basis for its holding that the mechanic's lien statute did not "relate to" an employee benefit plan, also looked to *Plumber's Local 458 Holiday Vacation Fund v. Howard Immel, Inc.,* 151 Wis.2d 233, 445 N.W.2d 43 (Wis.Ct.App. 1989). In that case, the Wisconsin Court of Appeals held that the Wisconsin statute which provided for the use of a construction lien to collect delinquent contributions was not preempted by ERISA. 445 N.W.2d at 45. Like Hawaii's mechanic's lien statute, the Wisconsin construction lien law was a general statute without any specific reference to ERISA obligations; it merely provided a remedy to a certain class of creditors that existed independently of ERISA obligations. *Id.* Contrary to Petitioners' contention, however, the Hawaii Supreme Court did not rely "heavily" on the *Immel* decision, while choosing to ignore the holdings of the federal courts in making its decision. Pet. 10. Instead, the Hawaii Supreme Court analyzed and applied the precedents of this Court to determine whether Hawaii's mechanic's lien statute was preempted, and looked to *Immel* as further support for its decision. *Maui Prince Hotel,* 918 P.2d 1150-1154.

After determining that ERISA did not limit the use of state laws to permit recovery of delinquent trust fund

contributions, the Hawaii Supreme Court then addressed the issue of whether or not Hawaii's lien law was in conflict with ERISA. In connection with this determination, the Court looked to the purpose of ERISA's preemption provision. The Court analyzed the legislative history of ERISA and concluded:

> Given that the purpose of ERISA's preemption provision is to 'afford employers [or fund trustees of multiemployer benefit plans] the advantages of a uniform set of administrative procedures' in order to avoid 'the burden that would be imposed by a patchwork scheme of regulation,' see Fort Halifax Packing, 482 U.S. at 11-12, 107 S.Ct. at 2217, it does not follow that the fund trustees themselves are preempted from using a state law available to general creditors to collect money judgments.

918 P.2d at 1154.

The Hawaii Supreme Court further discussed the broad powers to collect fringe benefit contributions given to plan trustees under ERISA, including the responsibility for collecting contributions in a diligent, systematic, and reasonable manner, and specifically noted the enactment of the MPPAA to facilitate in the continuing problem of collecting employer contributions. *Id.* at 1153-55. The Court concluded that the use of Hawaii's mechanic's lien law to assist with the collection process was consistent with the objectives of ERISA and MPPAA.

Finally, the Hawaii Supreme Court stated that ERISA preemption of Hawaii's mechanic's lien law would ignore relevant Federal policy. The court stated that it "expressly recognized in *Hawai'i Carpenters' Trust Funds v. Aloe*

Development Corp., 63 Haw. 566, 633 P.2d 1106 (1981), that the trustees of employee benefit plans have a fiduciary duty to collect delinquent trust fund contributions, and accordingly, may utilize HRS § 507-42, *et seq.* in the discharge of their duties to the beneficiaries of the HLTF". *Id.* at 1156. Federal policy is entirely consistent with *Aloe*'s conclusion regarding the trustee's fiduciary duties. Accordingly, the Hawaii Supreme Court concluded that a determination that the trustees could not use the state lien law would "ignore relevant federal policy and fly in the face of logic." *Id.*

B. The Reference To ERISA In The Trust Funds' Applications For Mechanic's Liens Does Not Require Preemption

Petitioners contend that ERISA preemption is required because the Trust Funds state in their applications for mechanic's lien that Yost and BCI failed to pay the contributions mandated by their respective Collective Bargaining Agreements. Pet. 15-16. Petitioners contend that the mention of 29 U.S.C. § 1132(g)(2) in the lien application alone mandates ERISA preemption. Trust Funds object to the consideration of this argument because it was not made and preserved in the Hawaii Supreme Court. Sup.Ct.R.15.2. Petitioner also contends that the Trust Funds relied upon 29 U.S.C. § 1132(g) in the lien application. This is patently untrue. The mention of this statute merely informed the court of the underlying basis for additional liability of the delinquent employers under federal law. Section 1132(g) and Section 1145, both

remedial provisions, are not elements of the lien application claim nor were they relevant to a finding of probable cause for the lien application to be granted.

III. THE DECISION OF THE HAWAII SUPREME COURT PRESENTS NO CIRCUIT CONFLICT

Petitioners contend that the Hawaii Supreme Court decision conflicts with the decisions of three other federal circuit courts of appeal. Pet. 7, 10, 16. Specifically, Petitioners claim that the Hawaii Supreme Court's decision conflicts with the opinions reached on ERISA preemption of state lien laws in the following cases: *Trustees of the Electrical Workers Health and Welfare Trust v. Marjo Corporation*, 988 F.2d 865 (9th Cir. 1993); *McCoy v. Massachusetts Institute of Technology*, 950 F.2d 13 (1st Cir. 1991); *Iron Workers Mid-South Pension Fund v. Terotechnology Corp.*, 891 F.2d 548 (5th Cir. 1990).

The continued validity of these decisions is now questionable in view of this Court's holdings in *Blue Cross* and *Dillingham*. *Cf. Gee v. Southwest Airlines*, 110 F.3d 1400, 1409-1410, (9th Cir. 1997) (O'Scannlain, J., concurring).[6] The Courts in *Marjo, McCoy* and *Terotechnology* did

---

[6] In *Gee*, Judge O'Scannlain, in his concurring opinion, recognized that earlier decisions of this Court broadly interpreting "relating to" under ERISA may no longer control. *Id.* Recent state and federal court decisions are also recognizing the more current decisions of this Court and its reasoning in finding that collateral actions (i.e., actions other than claims under 29 U.S.C. § 1145 against employers) to recover delinquent trust fund contributions are not preempted by 29 U.S.C. § 1144(a). The New Jersey Supreme Court in *Board of Trustees of*

not start from the "assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear manifest purpose of Congress", *Blue Cross*, 115 S.Ct. 1671, 1676, and instead, based their holdings on the prior decisions of this Court that ERISA was to be given a broad and expansive interpretation so that any state law which could conceivably in any manner affect an ERISA plan would be preempted. Moreover, the lien laws in *McCoy* and *Terotechnology* are distinguishable from the Hawaii lien law in that the statutes in both those cases specifically granted preferential treatment to ERISA plans. *McCoy*, 950 F.2d at 16; *Terotechnology*, 891 F.2d at 556. The Court in *Marjo* did not look to the Congressional objectives behind ERISA in connection with the Nevada lien statute,[7] but rather determined that under the prior precedents of this Court, the lien law "related to" an ERISA plan, even though the statute was not specifically designed to affect an ERISA plan, because the statute was used to supplement the collection mechanisms available under the plan. 988 F.2d at 867. The test for ERISA preemption of the Ninth Circuit Court in *Marjo* is now archaic in light of the more recent decisions by this Court.

Operating Engineers Local 825 Fund Service Facilities v. L.B.S. Construction Co., Inc., 148 N.J. 561, 691 A.2d 339 (1997) notes "a trend in recent federal precedent that has qualified the broad language of *Shaw* and has limited ERISA preemption of generally applicable state laws," and summarizes these recent decisions. *Id.* at 342.

[7] The Ninth Circuit Court in *Marjo* summarily dismissed the trustees' arguments that Congress narrowed the ERISA preemption provisions when it enacted the 1980 amendments to ERISA. 988 F.2d at 868.

Based on this Court's holdings in *Blue Cross* and *Dillingham* courts must now "go beyond the unhelpful text and the frustrating difficulty of defining its key term, and look instead to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive." *Blue Cross*, 115 S.Ct. at 1677. In looking at the objectives of the ERISA statute, it is clear that a state mechanic's lien law of general applicability which assists plan trustees in collecting delinquent contributions is consistent with Congress' purpose of protecting participants' rights. The indirect recovery of delinquent trust fund contributions from persons other than the delinquent employer does not bind plan administrators to any particular choice and thus function as a regulation of an ERISA plan itself. No uniform practice of the plan is directly or indirectly influenced by monies recovered from parties other than the delinquent employer. Further, the use of Hawaii's mechanic's lien law would not interfere with establishing a "uniform body of benefits law." *See Ingersoll-Rand*, 111 S.Ct. at 484. Moreover, the lien law assists the plans in collecting delinquent contributions as is required under ERISA without increasing the "administrative and financial burden of complying with conflicting directives among States or between States and the Federal Government." *Id.* The Hawaii mechanic's and materialman's lien law is a mere tool which the Trust Funds can elect to exercise, not a directive to the Trust Funds to comply with state law.

In view of this Courts' holdings in *Blue Cross* and *Dillingham*, and the legislative history behind ERISA and the MPPAA, the Hawaii Supreme Court correctly applied

the precedents of this Court to the particular state lien statute. To the extent any of the decisions cited by Petitioners conflict with the decision of the Hawaii Supreme Court, they are distinguishable upon their facts and/or are in conflict with the most recent decisions of this Court.

CONCLUSION

The decision of the Hawaii Supreme Court below is in full accord with the underlying ERISA preemption jurisprudence of this Court. For these reasons, Respondents respectfully urge the Court to deny the petition for writ of certiorari sought by Petitioners in this case.

Respectfully submitted,

Lissa H. Andrews (Counsel of Record)
Wesley H. Ikeda
Tam O'Connor & Henderson
220 South King Street, 20th Floor
Honolulu, Hawaii 96813
(808) 545-3030

APPENDIX A

CHAPTER 507. LIENS
PART II. MECHANIC'S AND MATERIALMAN'S LIEN

§ 507-42 When allowed; lessees, etc.

Any person or association of persons furnishing labor or material in the improvement of real property shall have a lien upon the improvement as well as upon the interest of the owner of the improvement in the real property upon which the same is situated, or for the benefit of which the same was constructed, for the price agreed to be paid (if the price does not exceed the value of the labor and materials), or if the price exceeds the value thereof or if no price is agreed upon by the contracting parties, for the fair and reasonable value of all labor and materials covered by their contract, express or implied.

Where the terms of a lease, contract of sale, or instrument creating a life tenancy require the improvement of the real property, the interest of the lessor, vendor, or remainderman in the improvement and the land upon which the same is situated shall likewise be subject to the lien, and any provision for forfeiture or other penalty against the lessee, vendee, or life tenant in case of the filing of a mechanic's or materialman's lien or actions to enforce the same, shall not affect the rights of lienors.

§ 507-43 Filing notice, contents.

(a) Requirements. Any person claiming a lien shall apply therefor to the circuit court of the circuit where the property is situated. Such "Application For A Lien" shall

be accompanied by a written "Notice Of Lien" setting forth the alleged facts by virtue of which the person claims a lien. A copy of the Application and Notice shall be served in the manner prescribed by law for service of summons upon the owner of the property and any person with an interest therein and upon the party or parties who contracted for the improvements if other than the owner of the property or any person with an interest therein. If any person entitled to notice cannot be served as herein provided, notice may be given the person by posting the same on the improvement. The Application shall set forth the amount of the claim, the labor or material furnished, a description of the property sufficient to identify the same, and any other matter necessary to a clear understanding of the claim. If the claim has been assigned, the name of the assignor shall be stated. The Application shall specify the names of the parties who contracted for the improvement, the name of the general contractor and the names of the owners of the property and any person with an interest therein. The Application may (but need not) specify the names of the mortgagees or other encumbrancers of the property, if any, and the name of the surety of the general contractor, if any.

The Application and Notice shall be returnable not less than three nor more than ten days after service. On the return day, a hearing shall be held by the court to determine whether probable cause exists to permit the lien to attach to the property. Any person to whom notice is required to be given shall be permitted to offer testimony and documentary evidence on the issue of whether probable cause exists to permit the lien to attach. If the

person who contracted for the improvement from which the requested lien arises claims a set-off against the lienor or if any person to whom notice is required to be given otherwise disputes the amount of the requested lien, the court shall hear and receive all admissible evidence offered and shall only permit the attachment of a lien in the net amount which the court determines is the reasonable probable outcome of any such dispute. The return day hearing may be continued at the order of the court so that the entire controversy need not be determined on the originally scheduled return day. The lien shall not attach to the property until the court finds probable cause exists and so orders. No such order shall be entered before the Application and Notice have been served on the party contracting for the improvement, the general contractor and the owner of the property, and they were given an opportunity to appear at the hearing.

(b) Time for filing. The Application and Notice shall be filed not later than forty-five days after the date of completion of the improvement against which it is filed. Where title to the property involved, or any portion thereof, is registered in the land court it shall be incumbent upon the lienor to file a certified copy of the Order Directing Lien To Attach in the office of the assistant registrar of the land court within seven days after the entry thereof in order to preserve the lienor's rights against subsequent encumbrancers and purchasers of the property.

(c) Joint owner. If the fee title to the land involved is held in joint or common ownership or as an estate by the entirety, service upon one of the owners of the Application and Notice in accordance with this section shall be

deemed service upon all of the owners. Likewise, if the parties who contracted for the improvement, if other than the owner of fee title to the property involved, hold their interest in the premises in joint or common ownership, or as an estate by the entirety, service upon one of the parties of the Application and Notice in accordance with this section shall be deemed service upon all of the parties.

(d) Owner acting through attorney-in-fact. In cases where materials have been furnished or labor was performed at the request, or upon the order, of a person acting under a duly executed and acknowledged power of attorney from the owner and (1) the power of attorney has not been revoked, or (2) the power of attorney has been revoked subsequent to the furnishing of materials and labor upon request or order and the owner cannot be found within the State, service of the Application and Notice upon the person acting under the power of attorney shall be deemed service upon the owner.

(e) Duration of lien. The lien shall expire three months after the entry of the Order Directing Lien to Attach unless proceedings are commenced within that time to collect the amount due thereon by enforcing the same.

(f) Date of completion, notice of. The term "date of completion" as used in this section means the time when the owner or the general contractor for the improvement completes the publication of a notice that the improvement has been completed or has been abandoned and an affidavit of the publication, together with a copy of the notice has been filed in the office of the clerk of the circuit

court where the property involved is situated; provided that notice of completion shall not be effective for any purpose unless prior to the notice there has been substantial completion of the improvement or the improvement has been actually abandoned; and provided further that the notice shall not be published by the contractor until after the contractor has first made written demand upon the owner to publish the notice and the owner has failed to publish the notice within five days from the date of the demand. The publication of the notice by the contractor or the owner shall not be construed as an admission by either that the improvement has been satisfactorily completed. The notice required herein shall be published twice, seven days apart, in a newspaper of general circulation, printed and published in the county in which the property involved is situated, and the publishing newspaper shall promptly file the affidavit of publication above mentioned in the office of the clerk.

(g) Failure to file or publish notice. If a valid notice of completion is not published and filed within one year after the actual completion or abandonment of the improvement the "date of completion" shall be deemed to be one year after actual completion or abandonment.

Supreme Court, U.S.
FILED
JUN 9 1997
OFFICE OF THE CLERK

No. 96-1651

In the
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

WCC Associates, Birtcher/BCI, *Petitioners*

v.

Hawaii Carpenters Trust Funds; United Brotherhood of Carpenters and Joiners of America, Local 745, AFL-CIO, *Respondents*.

On Petition for a Writ of Certiorari
to the Supreme Court of Hawaii

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

John S. Edmunds
Edmunds & Verga
841 Bishop Street, Suite 2104
Honolulu, Hawaii 96813-3945
(808) 524-2000
Counsel of Record

October 1996

QUESTION PRESENTED

Whether the Employment Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 *et seq.*, preempts the use of a state mechanic's lien statutes to recover unpaid ERISA trust fund contributions where there is no pre-existing judgment and where liability to make those contributions is dependent on interpretation of ERISA provisions related to a collective bargaining agreement?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTRODUCTION 1

REASONS FOR GRANTING THE PETITION 2

CONCLUSION 6

TABLE OF AUTHORITIES

Cases:

California Division of Labor Standards Enforcement, et al. v. Dillingham Construction, N.A., Inc., ___ U.S. ___, 117 S.Ct. 832, 136 L.Ed.2d 791 (1997) 5

Carpenters Pension Trust for Northern California v. Underground Construction Company, Inc., 31 F.3d 776 (9th Cir. 1994) 1, 3

Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 111 S. Ct. 478, 112 L. Ed. 2d 474 (1990) 4

Pilot Life Insurance Company v. Dedeaux, 481 U.S. 41, 107 S. Ct. 1549, 95 L. Ed. 2d 39 (1987) 4

Seaway Port Authority v. Duluth-Superior ILA Marine Association, 920 F.2d 503 (8th Cir. 1990), *cert. denied*, 501 U.S. 1218 (1991) 3

Rules and Statutes

29 U.S.C. § 1001 ..... i, 1

29 U.S.C. § 1144(a) 4

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

WCC Associates, Birtcher/BCI, *Petitioners,*

v.

Hawaii Carpenters Trust Funds; United Brotherhood of Carpenters and Joiners of America, Local 745, AFL-CIO, *Respondents.*

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

INTRODUCTION

Respondents' Brief in Opposition to Petition For A Writ of Certiorari filed May 28, 1997 (hereinafter "RB") fails to note that the issue here is the conflict regarding imposition of liability under the Employment Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 *et seq.*, as distinguished from Hawaii`s state mechanic's lien statute, and not the mere enforcement of pre-existing judgments. Allowing Respondents to proceed under Hawaii's mechanic's lien statute would impose liability on Petitioners which the Ninth Circuit has expressly held would not be imposed under ERISA. *See Carpenters Pension Trust for Northern California v. Underground Construction Company, Inc.*, 31 F.3d 776, 779-780 (9th Cir. 1994). This would defeat

Congress' intent to develop a uniform body of Federal common law governing pension plans.

REASONS FOR GRANTING THE PETITION

Respondents obtained judgments *only* against subcontractors BCI and Yost, not against Petitioners. Respondents argue that Petitioners failed to submit any admissible evidence in the state circuit court regarding the existence or non-existence of a judgment. *See* RB, pp. 4-5. But because the Hawaii state circuit court dismissed the original proceeding based on ERISA preemption before a probable cause hearing was held on the issue of whether Respondents could file mechanic's liens, there cannot yet be any judgments; the cases have not progressed that far. Further, Petitioners should not be forced to go through with a probable cause hearing if this area is preempted by ERISA. Preemption should be determined at the outset to prevent needless litigation in state court.

Since Respondents do not have a judgment against Petitioners, they cannot be said to be merely enforcing a judgment. And Petitioner Birtcher/BCI cannot be held responsible for the debts of BCI and Yost. Under the very collective bargaining agreements ("CBAs") relied upon by Respondents, Petitioner Birtcher/BCI is only responsible for the pension fund contributions of their employees, not the employees of BCI and Yost. The CBAs were signed by BCI and Yost in their individual capacities, not as said Petitioner's representatives.[1] The joint venture agreement which created

---

[1] Respondents' argument that the CBAs should be stricken from the record below is misplaced. *See* RB, p. 3. Since the Hawaii Supreme Court did not rule on objections made to Petitioners' introduction of the copy of the CBA, that evidence remains in the record and can be considered.

Petitioner Birtcher/BCI contains no express assumption by either joint venturer of primary or default responsibility for contributions so as to establish liability under ERISA. To the contrary, the joint venture agreement expressly prohibited the Joint Venturers from assuming such obligations without approval by the joint venture committee. Thus, Petitioners have no express liability for the disputed pension fund contributions under the CBAs.

The Ninth Circuit has expressly held that under ERISA, a joint venturer such as Petitioner Birtcher/BCI is not liable for its subcontractors' debts unless it is contractually bound to make pension contributions. *Carpenters Pension Trust for Northern California v. Underground Construction Company, Inc.*, 31 F.3d 776, 779-780 (9th Cir. 1994). The Eighth Circuit reached a similar conclusion, after surveying decisions from other circuits, in *Seaway Port Authority v. Duluth-Superior ILA Marine Association*, 920 F.2d 503, 509 (8th Cir. 1990), *cert. denied*, 501 U.S. 1218 (1991) ("one fact common to all of the parties held subject to withdrawal liability: *they were contractually bound to make pension contributions* . . ." [emphasis in original]). Further, as the Ninth Circuit held in *Underground Construction, supra*, if ERISA provisions "... provide an avenue of escape from . . . liability where a contractor adopts the JV [joint venture] approach as a general practice, only Congress can close this gap." 31 F.3d at 779. Petitioners' case demonstrates how, absent a clear ruling on preemption by this Court, parties such as Respondents can continue to use state court proceedings to thwart Congressional intent.

Under the Ninth Circuit's interpretation of ERISA provisions, which the United States District Court for the District of Hawaii must follow and the Hawaii state court should follow, Petitioners are not liable for the disputed

pension fund contributions. Here, Respondents have attempted to manufacture liability in the Hawaii state courts by using Hawaii's mechanic's lien statutes where the parties expressly contracted to avoid such liability through the use of a joint venture arrangement. Respondents' actions are inconsistent with Congress' intent to create uniform federal regulation of pension plans.

This Court has expressly stated that Congress intended to preempt state law and "establish pension plan regulation as exclusively a federal concern." *Pilot Life Insurance Company v. Dedeaux*, 481 U.S. 41, 45-46, 107 S. Ct. 1549, 95 L. Ed. 2d 39 (1987). In *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 111 S. Ct. 478, 112 L. Ed. 2d 474 (1990), this Court found that in passing ERISA Section 514(a) [29 U.S.C. § 1144(a)], Congress intended

> to ensure that plans and plan sponsors would be subject to a uniform body of benefits law; the goal was to minimize the administrative and financial burden of complying with conflicting directives among States or *between States and the Federal Government* ..., [and to prevent] the potential for conflict in substantive law ... requiring the tailoring of plans and employer conduct to the peculiarities of the law of each jurisdiction.

498 U.S. at 142 [emphasis added].

In *California Division of Labor Standards Enforcement, et al. v. Dillingham Construction, N.A., Inc.*, ___ U.S. ___, 117 S.Ct. 832, 136 L.Ed.2d 791 (1997), this Court noted that

> [T]o determine whether a state law has the forbidden connection [with ERISA], we look both to "the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive," ibid., as well as to the nature of the effect of the state law on ERISA plans, id., [514 U.S.] at ----, 115 S.Ct., at 1677.

117 S.Ct. at 838.

Here, Congress' intent to ensure that plans and plan sponsors would be subject to a uniform body of benefits law is thwarted by the effect of Hawaii's mechanic's lien law on ERISA plans. Hawaii's mechanic's lien law is being used by Respondents to impose liability for pension fund contributions which does not exist under ERISA. Thus, the "forbidden connection" defined in *Dillingham, supra*, exists between ERISA and Hawaii's mechanic's lien law as applied by Respondents.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

John S. Edmunds
Edmunds & Verga
841 Bishop Street, Suite 2104
Honolulu, Hawaii 96813-3945
(808) 524-2000
Counsel of Record